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No. 97-7213-CFY Title: Sylvester Mosley, Petitioner
v.
United States

Docketed: December 22, 1997 Court: United States Court of Appeals for the Third Circuit

Entry	Date	Proceedings and Orders
	Dec 22 1997	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due February 20, 1998)
	Jan 15 1998	Order extending time to file response to petition until February 20, 1998.
	Feb 18 1998	Brief of respondent United States in opposition filed.
	Mar 5 1998	DISTRIBUTED. March 20, 1998
	Mar 23 1998	Petition GRANTED. limited to Question 1 presented by the petition. SET FOR ARGUMENT October 14, 1998. **********
	Apr 2 1998	Order extending time to file brief of petitioner on the merits until May 28, 1998.
	May 26 1998	Brief amicus curiae of Association of Criminal Defense in New Jersy filed.
	May 27 1998	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	May 28 1998	Joint appendix filed.
	May 28 1998	Brief of petitioner Sylvester Mosley filed.
	Jun 29 1998	Order extending time to file brief of respondent on the merits until July 8, 1998.
	Jul 8 1998	Brief of respondent United States filed.
	Jul 31 1998	CIRCULATED.
	Aug 13 1998	Reply brief of petitioner Sylvester Mosley filed.
	Sep 2 1998	Record filed.
	Sep 2 1998	Record filed.
	Oct 14 1998	ARGUED.

EDITOR'S NOTE

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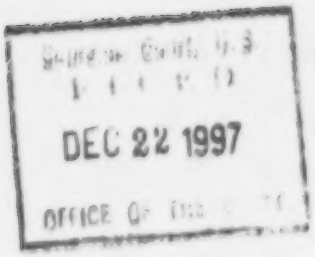

NO:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

SYLVESTER MOSLEY
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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97-7213
Mosley
v.
United States

QUESTIONS PRESENTED

1. Whether Bank Larceny, in violation of 18 U.S.C. § 2113(b), is a lesser included offense of Bank Robbery in violation of 18 U.S.C. §2113(a), as a matter of law, pursuant to the textual "elements" test adopted by the United States Supreme Court in Schmuck v. United States, 489 U.S. 705, 109 S.Ct. 1443 (1989).

2. Whether the admission at trial of testimonial and documentary evidence regarding petitioner's propensity to commit crime and his bad character and lack of good character pursuant to Fed. R. Evid.404 (b) and 403 deprived petitioner of his Sixth Amendment right to a fair trial.

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PRAYER

The petitioner, Sylvester Mosley, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit issued September 18, 1997.

PARTIES TO THE PROCEEDING

In accordance with Rule 14.1(b) of this Court, all parties to the proceeding are cited in the case caption.

OPINIONS BELOW

On September 18, 1997, the United States Court of Appeals for the Third Circuit docketed a Judgment and filed an Opinion affirming the Judgment of Conviction entered by the United States District Court for the District of New Jersey. (Pa 2-14)[1]

On January 21, 1997, the United States District Court for the District of New Jersey filed an Opinion denying Petitioner's Motion for a new trial and judgment of acquittal as to Count II of the Indictment. (Pa 15-46).

STATEMENT OF JURISDICTION

Jurisdiction to review the September 18, 1997, judgment and opinion of the United States Court of Appeals for the Third Circuit (Pa 1) is conferred on The United States Supreme Court by 28 U.S.C. § 1254(1).

The Court of Appeals for the Third Circuit had jurisdiction to review the judgment of conviction of the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1291.

The United States District Court for the District of New Jersey had jurisdiction over this matter pursuant to 18 U.S.C. § 3231.

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[1]The appendix included in this Petition will be referred to as "Pa" followed by page reference.

CONSTITUTIONAL PROVISION INVOLVED

The relevant constitutional provision involved is the Sixth Amendment to the United States Constitution, which guarantees the right to a fair trial, and states:

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 2113. **Bank robbery and incidental crimes**

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association;

Title 18 U.S.C. § 2113.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both;

STATEMENT OF THE CASE

Course of Proceedings:

On January 4, 1996, Indictment Number 96-12 was filed charging petitioner, Sylvester Mosley, with two counts of bank robbery in violation of 18 U.S.C. § 2113(a) and 2. (App. 1-2, 5).[2] Mosley was arraigned on the Indictment and pled not guilty on January 17, 1996. (App. 6).

Relevant to this petition, Mosley filed a motion for a pretrial determination of the admissibility of evidence pursuant to Fed. R. Evid. 404(b) and 403 on February 2, 1996. (App. 6, 29). The district court ruled that Mosley was only entitled to notice, pretrial, of the government's intention to introduce evidence regarding a prior bank robbery conviction of Mosley pursuant to Fed. R. Evid. 404(b) and that it would not make a pretrial determination as to its admissibility. (App. 29-30).

Mosley was tried before a jury on March 4 and 5, 1996. (App. 61-373). After beginning deliberations, the jury had one question regarding the bank robbery charged in Count II of the Indictment. (App. 367-369). The question was answered by the Court, and the jury returned to its deliberations. Shortly thereafter the jury returned verdicts of guilty as to both counts of the Indictment. (App. 369-370).

On March 12, 1996, Mosley filed a timely Notice of Motion for a new trial pursuant to Fed. R. Crim. P. 33 and for a Judgment of Acquittal as to Count II of the Indictment pursuant to Fed. R. Crim P. 29(c). (App. 7, 9-10).

On December 9, 1996, the district court heard arguments on the post-trial motions and denied both of them. (App. 374-389). Also, on December 9, 1996, the Court sentenced

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[2] "App." followed by page numbers refers to pages from the Appendix filed with Mosley's brief to the United States Court of Appeals for The Third Circuit.

Mosley to, among other things, 210 months imprisonment on each count to be served concurrently with each other. (App. 387-388).

On December 9, 1996, the district court filed a Judgment of Conviction, (App. 14) and sua sponte, the district court filed an Amended Judgment of Conviction on January 23, 1997. (App. 18). (Pa 50-57).

On January 21, 1997, the district court filed a letter-opinion regarding Mosley's post-trial motions. (Pa 15-46).

The United States Court of Appeals for the Third Circuit affirmed Mosley's conviction in a Judgment and Opinion issued September 18, 1997. (Pa 2-14).

The United States Court of Appeals for the Third Circuit denied Mosley's petition for rehearing en banc in an Order issued December 15, 1997. (Pa 1).

Statement of Facts:

Mosley conceded in his opening statement to the jury that he, in fact, entered both banks charged in the Indictment and that he took money from those banks. (App. 122). He conceded the issue of identity. (App. 122). His defense was that his conduct with respect to both counts of the Indictment did not satisfy the requisite elements of bank robbery in violation of 18 U.S.C. § 2113(a). (App. 124-130).

COUNT I

As to Count I of the Indictment, a bank teller at the First Fidelity Bank, 233 Fifth Avenue, Paterson, New Jersey, testified that she was working on November 20, 1995. (App. 130). She testified that Mosley was waiting his turn on line and approached her window. (App. 131-132). After saying "Good morning" to her he leaned into her window and said "This is a hold up." (App. 132). Mosley then said "open your bottom drawer and give me all the big bills, start with the big bills first." (App. 132). Ms. Neufville testified that she was

nervous, that she wet her pants and that she threw money on the counter. (App. 132-133). She asked Mosley if she could go to the bathroom and he replied "Hurry, hurry, open the drawer and give me the big bills first." (App. 133). She testified that Mosley "gestured to his coat as if he had something there." (App. 133). After throwing the money on the counter she ran to the head teller and said, "I just been held up, I just been held up." (App. 133).

On cross-examination, Ms. Neufville testified that, after giving Mosley the money, that she locked her drawer and started walking toward the bathroom. (App. 140). She was interviewed by the local police the day of the incident and, stated nothing regarding Mosley having a weapon. (App. 143). She testified that there were 10 or 11 other customers in the bank at the time of the incident. (App. 144-145).

FBI Special Agent Carolyn Zimmer testified that she interviewed Ms. Neufville shortly after the incident (App. 245) and prepared a report contemporaneous to the interview. (App. 247). Special Agent Zimmer reported that Ms. Neufville walked away from her teller station after the incident; (App. 251-252) that Mosley had a "sickly appearance" (App. 252) and that Mosley had told the teller, at the time of the incident, that he was "sick." (App. 253-254).

FBI Special Agent John Conway testified that he arrested Mosley on November 20, 1995 after the incident charged in Count I of the Indictment (App. 179) and that Mosley stated "We robbed the bank, the First Fidelity Bank." (App. 181). He testified that he never asked Mosley to explain what he meant by the word "Rob." (App. 191); and that he wrote a detailed report of the incident. (App. 191). He testified that there was nothing in his report regarding threats, force or intimidation on the part of Mosley with respect to both counts of the Indictment. (App. 193). He also testified regarding bank surveillance video tapes of both

incidents charged in the indictment and that they did not reveal evidence of threats, force, intimidation or violence. (App. 167-203).

Reverend Louis McDowell testified that he was a customer in the bank on November 23, 1995 (App. 265); that he was directly behind Mosley (App. 265); that he did not observe Mosley make any motions with respect to Ms. Neufville (App. 266); and that he did not see anything that he would characterize as force or violence. (App. 266). He testified that Mosley walked past him and out of the bank (App. 268), and that Ms. Neufville walked away from her teller station. (App. 269).

COUNT II

As to Count II, Monica Brown testified that she was working as a teller at the First Fidelity Bank, 1008 Madison Avenue, Paterson, New Jersey on November 9, 1995, at the time of the incident charged in Count II of the Indictment. (App. 157-158).

Ms. Brown's testimony, on direct examination, was that she was held up by a man who held up a sign with both of his hands that said in capital letters "HOLD UP". (App. 157-158). She testified that she was scared and nervous and that Mosley placed both his hands down and asked her for money by saying "Can I have all your money?" (App. 159-160).

Ms. Brown further testified that Mosley employed a defensive but demanding tone of voice, but that he said nothing else to her. (App. 160). She proceeded to give Mosley "bait money" but Mosley threw it back. (App. 160). She then proceeded to give him the other money and that Mosley walked away in a fast pace. (App. 161). She testified that she was very nervous and scared after Mosley left the bank. (App. 162).

On cross-examination, Ms. Brown testified that she never told the Paterson Police or the FBI Agents that she saw Mosley with a weapon and that both of Mosley's hands were visible to her. (App. 167). She testified that the incident lasted about five seconds. (App.

168). In conclusion, Ms. Brown testified that Mosley appeared to be homeless, that he had bags under his eyes, and that he appeared to be 60 years old. (App. 170).

The other evidence with respect to Count II came from the testimony of FBI Special Agent John Conway. Special Agent Conway testified that he arrested Mosley (App. 186), discussed the allegations in this case with him and wrote a detailed report of his interview of Mosley. (App. 191-192). Special Agent Conway testified that his report contained nothing about force, violence or intimidation of the part of Mosley. (App. 193).

Special Agent Conway also testified regarding the surveillance videotape regarding Count II. (App. 215). He testified that the videotape revealed several customers and bank employees present at the time of the incident charged in Count II of the Indictment. (App. 217, 226-227). He further testified that the videotape revealed no evidence of violence or force on part of the Mosley. (App. 227-228). Finally, there was no testimony that the videotape revealed evidence of intimidation on the part of Mosley. (App. 228).

Paterson, New Jersey Police Officer Robert Medwick testified that he interviewed Ms. Brown shortly after the incident charged in Count II and that he wrote a report. (App. 260-262). Officer Medwick reported that Ms. Brown said that Mosley asked her for the money, she gave it to him, that he fled without saying anything else and that he was not brandishing any kind of weapon. (App. 263). He further testified that he interviewed Ms. Brown within 16 minutes of the incident and that she did not appear to be upset. (App. 263). Ms. Brown described Mosley as "homeless looking." (App. 263).

Marisol Maccarotta testified that she was working as a teller at the same bank as Monica Brown on November 9, 1995. (App. 269-270). She testified that she was one teller station away from Ms. Brown; that Mosley was standing on a line to be waited on at the

teller stations; (App. 271) and that she did not hear or see anything regarding the incident charged in Count II. (App. 273).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This case presents an important question of federal appellate law on which the Circuit Courts of Appeal are split and it presents an important federal constitutional issue regarding the right to a fair trial.

Firstly, the opinion in United States v. Mosley, 126 F.3d 200 (3d Cir. 1997), holding that Bank Larceny, in violation of 18 U.S.C. § 2113(b), is not, as a matter of law, a lesser included offense of Bank Robbery, in violation of 18 U.S.C. § 2113 (a), directly conflicts with the holdings of the Court of Appeals for the First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits. See United States v. Mosley, (Pa 12, 13)(Collecting cases). This conflict results in an intolerable disparate treatment of criminal defendants that happen to be charged within the jurisdiction of the Third Circuit as opposed to being charged in virtually any other federal jurisdiction within the United States. Indeed, the Third Circuit acknowledged that its opinion was against the weight of authority. (Pa 2), (Pa 11, 12).

Moreover, the Third Circuit's holding in United States v. Mosley incorrectly applies the textual "elements" test for determining whether an offense is "necessarily included" in the offense charged that was adopted by this Court in Schmuck v. United States, 489 U.S. 705, 109 S.Ct. 1443 (1989).

Secondly, at trial, testimonial and documentary evidence regarding petitioner's propensity to commit crime and his bad character and lack of good character was admitted in the prosecution's case-in-chief. See e.g. Government Exhibit 118 (Pa 47-49). Whereas,

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U.S. 59, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not reflected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, it the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Michaelson v. United States*, 335 U.S. 469, 475-476, 69 S.Ct. 213, 218-219, 93 L.Ed. 168 (1948) (footnotes omitted);

(cited with approval) Old Chief v. United States, ___U.S.___, 117 S.Ct. 644, 650 (1997).

To resolve the split in the Circuit Courts of Appeal and to vindicate and preserve petitioner's Sixth Amendment right to a fair trial, this Court should grant the Writ of Certiorari and reverse the opinion of the Third Circuit.

LEGAL ARGUMENT

POINT I

BANK LARCENY IS A LESSER INCLUDED OFFENSE OF BANK ROBBERY, 18 U.S.C. §§ 2113(a) AND (b)

Federal Rule of Criminal Procedure 31 (c) permits a jury to return a verdict of guilty as to an offense "necessarily included in the offense charged." In Schmuck v. United States, 489 U.S. 705, 716, 109 S.Ct. 1443, 1450 (1989) the Supreme Court adopted the "elements" test of determining whether an offense is "necessarily included" in the offense charged pursuant to Fed.R.Crim.P. 31(c). Under the "elements" test, a lesser offense cannot contain an element not required for the greater offense. The elements of the lesser offense must be

a "subset" of the elements of the offense charged. Schmuck, 489 U.S. at 714, 722, 109 S.Ct. At 1450, 1453.

This "comparison is appropriately conducted by reference to the statutory elements of the offenses in question..." 489 U.S. at 718, 109 S.Ct. At 1451. Significantly, this Court in Schmuck then stated that the comparison must be "textual." Id. at 720, 109 S.Ct. 1452-53.

Therefore, this Court did not state that the "exact same words" defining an element of the lesser offense must appear in the definition of the element in the greater offense. Petitioner Mosley most respectfully submits that the critical distinction between a "textual" comparison to determine a "subset" versus an "exact same words" comparison to determine the existence of a "subset" is the cause of the error in the Third Circuit's opinion sub judice.

In United States v. Mosley, the Third Circuit states that "[i]t is obvious that the definition of bank robbery in subsection (a) does not include an element that the defendant have the 'intent to steal or purloin.' On the other hand, bank larceny, as defined in subsection (b) includes this element." (Pa 9). Whereas, petitioner respectfully argues that "textually", the bank robbery statute contains the dictionary definition of "steal or purloin." That is, 18 U.S.C. §2113(a) contains the element "...takes or attempts to take, from the person..." and the word "steal" is commonly defined as "to take the property of another". See e.g. Webster's New Collegiate Dictionary, G & C Merrian Co. (1974) p. 1138. The word "purloin" is a synonym of "steal". Webster's at 937. Therefore, the terms employed in the text of the bank robbery and bank larceny statutes are alternative means of defining the same element.

Because the element "steal or purloin" contained in the bank larceny statute, 18 U.S.C. § 2113(b), is by definition contained in the bank robbery statute, 18 U.S.C. § 2113(a) (...take or attempt to take, from the person...) petitioner submits that it is a textual subset, and

therefore, as a matter of law, a lesser included offense within the meaning of the "elements" test adopted in Schmuck v. United States.

POINT II

ADMISSION AT TRIAL OF TESTIMONIAL AND DOCUMENTARY EVIDENCE REGARDING PETITIONER'S PROPENSITY TO COMMIT CRIME AND HIS BAD CHARACTER AND LACK OF GOOD CHARACTER DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL.

Mosley has a prior conviction for bank robbery of the First Fidelity Bank located on Madison Avenue, Paterson, New Jersey. This is the same bank that is the subject of Count II of the Indictment in this case. (App. 1-2). Mosley was charged with committing this prior bank robbery on April 30, 1991. He pled guilty and a Judgment of Conviction and Commitment Order was entered in the Superior Court of New Jersey, Passaic County on October 22, 1993. (App. 23-25) (Government Exhibit 118 at the trial). (Pa 47-49).

Mosley moved pretrial for a determination whether evidence regarding this prior bank robbery conviction should be admissible at trial. (App. 29). The district court ruled that Mosley was only entitled to pretrial notice of the government's intention to introduce evidence regarding this prior bank robbery conviction pursuant to Fed.R.Evid. 404(b), and that it would not make a pretrial determination as to its admissibility. (App. 29-30). The district court had a copy of government exhibit 118 (App. 377) (Pa 47-49) and stated that it was inclined to admit it at trial. (App. 32-33, 43, 60).

At trial the government indicated its intention to introduce in evidence Exhibit 118. (App. 177). (Pa 47-49). At sidebar, without hearing argument, the district court stated that "It seems to me its relevant." (App. 177). Mosley reiterated his objection pursuant to Fed.R.Evid.404(b) and 403 and argued "...its five years old, its remote, its not relevant to

what [happened in this case] and the prejudicial just has the potential to overwhelm any appropriateness as to what [Mosley] may have done five years ago". (App. 177-178). The district court admitted Exhibit 118 into evidence. (App. 178). The district court had a copy of Exhibit 118 at sidebar. (App. 378).

Mosley was permitted to voir dire the government's witness as to the authenticity of Exhibit 118. (App. 185). In light of the district court's ruling that Exhibit 118 was going to be admitted into evidence, Mosley raised no objection as to the authenticity of Exhibit 118. (App. 186).

The fact that Mosley continued to object to the admission of Exhibit 118 but not as to its authenticity, was clarified and the district court stated that it understood. (App. 219; 365-366).

Government Exhibit 118 consists of three pages. (App. 23-25). (Pa 47-49).

The first two pages state that Mosley was sentenced to the:

> Count I - Custody of the Commissioner of the Department of Corrections for 7 years. Said sentence to run concurrent with violation of probation. SSCP $75.00. Said sentence to run concurrent with sentence on 91-06-0980.

It also states the reason for Mosley's sentence as:

> Aggravating Factors: Risk that defendant will commit another offense. Extent of defendant's prior criminal record.
>
> Mitigating Factors: None.

(App. 23-26). (Pa 47-49).

Federal Rule of Evidence 404(b) prohibits the admission of evidence of other wrongs to prove a person's character "in order to show action in conformity therewith." Fed.R.Evid.

404(b). The rule allows the admission of such evidence for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id.

In Huddleston v. United States, 485 U.S. 681 (1988), the Court set out four factors that are relevant when ruling on the admissibility of evidence under Rule 404(b):

> (1) the other crimes evidence must have a proper purpose; (2) the proffered evidence must be relevant under Fed.R. Evid. 404(b); (3) its probative value must outweigh its potential for unfair prejudice under Rule 403 balancing; and (4) the court must charge the jury to consider the other crimes evidence only for the limited purpose for which it is admitted.

See also, Government of the Virgin Islands v. Edwards, 903 F.2d 267 (3d Cir. 1990).

The primary wrong engendered by allowing the introduction of so called "similar crimes" evidence is the improper affect it has on the jury's consideration of whether the defendant committed the crime for which he is charged. A jury hearing that a defendant committed crimes in the past is likely to conclude "if he did it before he probably did it this time." See, e.g., Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968).

In United States v. Long, 574 F.2d 761, 766 (3d Cir. 1978), the Third Circuit adopted the inclusionary approach to other crimes evidence, which admits all evidence of other crimes relevant to the issue at trial except those which tend to prove only criminal disposition. See also, United States v. Scarfo, 850 F.2d 1015, 1018-1021 (3d Cir. 1988) ("[R]ule 404(b) generally prohibits ... evidence ... intended to prove propensity for crime or to suggest to the jury unfavorable inferences reflecting on [defendant's] character.").

In the present matter, Government Exhibit 118 revealed to the jury that another judge had ordered that Mosley be imprisoned for 7 years in 1993; that Mosley had violated a prior

probationary sentence; and that Mosley had been sentenced to imprisonment for another crime in addition to robbing the First Fidelity Bank on Madison Avenue, Paterson, New Jersey in 1991. (App. 23). Moreover, page two of Government's Exhibit 118 revealed to the jury that another judge had stated that there were "aggravating factors" applicable to Mosley; that there was a risk that Mosley would commit another offense; that Mosley had an extensive prior criminal record; that Mosley needed to be deterred; and that there were no "mitigating factors" applicable to Mosley. (App. 24). (Pa 47-49)

Because of the above-cited contents of Government's Exhibit 118, Mosley respectfully submits that it was error to permit the jury in this case to have it in evidence. Mosley respectfully submits that this Exhibit was relevant only for the impermissible purposes of proving "criminal disposition," "propensity for crime" and suggesting to the jury "unfavorable inferences reflecting on [Mosley's] character." United States v. Long, 574 F.2d 761, 766 (3d Cir. 1978. United States v. Scarfo, 850 F.2d 1015, 1018-1021 (3d Cir. 1988).

Assuming arguendo, that Government's Exhibit 118 was admissible pursuant to Fed.R.Evid. 404(b), Mosley argued that it was inadmissible pursuant to Fed.R.Evid. 403. Federal Rule of Evidence 403 protects the accused against "unfair prejudice." United States v. Schwartz, 790 F.2d 1059, 1061 (3d Cir. 1986) (excluding relevant 404(b) evidence under Rule 403). The balancing test required by Fed.R.Evid. 403 is not pro forma; John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632, 635 (3d Cir. 1977). The trial court is to weigh the relevancy against any prejudice that might occur to the defendant. United States v. Goichman, 547 F.2d 778, 782 (3d Cir. 1976).

The unfair prejudice in this case caused by the admission into evidence of Government's Exhibit 118 was revealing to the jury that which another judge had stated about Mosley's propensity to commit crimes and Mosley's "aggravating" character and lack

of "mitigating" character. The inferences to be gleaned from Government's Exhibit 118 deal purely with Mosley's propensity to commit crimes and his bad character. Mosley respectfully submits that this prejudice, by far, outweighed any probativeness as to whether Mosley committed the bank robberies charged in the Indictment in this case.

Having been exposed to Government's Exhibit 118, the jury could not fairly consider whether the evidence in this case proved beyond a reasonable doubt that Mosley violated the requisite elements of bank robbery in violation of 18 U.S.C § 2113(a). In United States v. Murray, 103 F.3d 310 (3d Cir. 1997) the Third Circuit, in circumstances remarkably similar to the error complained of in the case sub judice, reversed a murder conviction and held that the district court erred under Fed.R.Evid. 404(b) and 403 by admitting testimony that the defendant had committed another murder that was not charged in the indictment. United States v. Murray, 103 F.3d at 313.

The court in Murray, stated, "trial judges need to exercise particular care in admitting such evidence". This is so for at least two reasons. First, the line between what is permitted and what is prohibited under Rule 404(b) is sometimes quite subtle. Second, Rule 404(b) evidence sometimes carries substantial danger of unfair prejudice and thus raises serious questions under Fed.R.Evid 403. Therefore, it is advisable for a trial judge to insist that a party offering Rule 404(b) evidence place on the record a clear explanation of the chain of inferences leading from the evidence in question to a fact 'that is of consequence to the determination of the action.' Fed.R.Evid. 401." United States v. Murray, 103 F.3d at 316.

No such procedures were followed in the case, sub judice, nor did the district court make any such findings prior to admitting the evidence over Mosley's objections pursuant to Fed.R.Evid. 404(b) and 403.

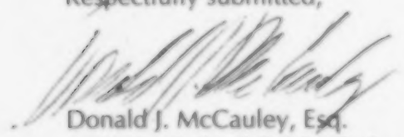
Moreover, in the present case the district court not only admitted testimony regarding Mosley's prior bank robbery conviction (App. 183-186), but also admitted documents that contained extraordinarily prejudicial and irrelevant information regarding Mosley's propensity to commit other crimes and his bad character. (See Exhibit 118, App. 23-25). (Pa 47-49)

It is respectfully submitted that this Court cannot conclude that the testimony regarding Mosley's prior bank robbery conviction and the admission of Exhibit 118 did not erroneously contribute to the jury's convicting Mosley. For the foregoing reasons, Mosley respectfully submits that his Sixth Amendment Right to a fair trial was violated and that the Third Circuit's opinion in United States v. Mosley is contrary to this Court's opinion in Old Chief v. United States, ___U.S.___, 117 S.Ct. 644 (1997).

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that the requested Writ of Certiorari be issued.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5832

UNITED STATES OF AMERICA

v.

SYLVESTER MOSLEY,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 96-00012)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MCKEE, Circuit Judges

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The petition for rehearing filed by the appellant, Sylvester Mosley, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT:

Circuit Judge

DATED: DEC 15 1997

cmh/cc: DJM
MC
ESF

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5832

UNITED STATES OF AMERICA

v.

SYLVESTER MOSLEY,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
D.C. Crim. No. 96-00012

Present: Stapleton, Greenberg, and Cowen, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on August 11, 1997.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 11, 1996, be, and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

Dated: September 11, 1997

Filed September 18, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5832

UNITED STATES OF AMERICA

v.

SYLVESTER MOSLEY,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 96-00012)

Argued August 11, 1997

BEFORE: STAPLETON, GREENBERG, and COWEN,
Circuit Judges

(Filed: September 18, 1997)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge*.

I. INTRODUCTION

Appellant Sylvester Mosley appeals from a judgment of conviction and sentence entered in the district court on two counts of bank robbery. Mosley argues that the district court erred in failing to instruct the jury that it could convict him of bank larceny as a lesser included offense of bank robbery.[1] This case raises an issue we have not addressed: whether bank larceny, 18 U.S.C. § 2113(b), is a lesser included offense of bank robbery, 18 U.S.C. § 2113(a). Contrary to the weight of authority, we find that bank larceny is not a lesser included offense of bank robbery. Thus, we will affirm.

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction to review the judgment of the district court pursuant to 28 U.S.C. § 1291. We exercise plenary review over the legal question raised on this appeal. *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir. 1985).

1. We also have considered Mosley's claims that the district court abused its discretion in admitting evidence of his prior conviction for bank robbery pursuant to Fed. R. Evid. 404(b) and 403, and that the district court erred in failing to grant him a judgment of acquittal on count two of the indictment pursuant to Fed. R. Crim. P. 29. After careful consideration, we find that neither of these claims justifies reversal so we reject these arguments without further discussion.

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II. FACTUAL AND PROCEDURAL HISTORY

Count one of the indictment charged Mosley with knowingly and willfully, by force and violence or intimidation, taking approximately $9,344.81 from a teller at the First Fidelity Bank at 233 Fifth Avenue in Paterson, New Jersey, in violation of 18 U.S.C. §2113(a) and 18 U.S.C. §2. Count two charged him with knowingly and willfully, by force and violence or intimidation, taking approximately $2,547 from a teller at the First Fidelity Bank at 1008 Madison Avenue in Paterson, New Jersey, also in violation of 18 U.S.C. §2113(a) and 18 U.S.C. §2. After a two-day trial, the jury found Mosley guilty on both counts. The district court subsequently sentenced Mosley to concurrent 210-month terms of imprisonment on each count and it imposed concurrent three-year terms of supervised release to follow the custodial terms.

There was no real factual dispute at trial as Mosley conceded in his opening statement to the jury that he entered both banks and took money from them. Rather, his defense was that his conduct did not satisfy the requisite elements of bank robbery in violation of 18 U.S.C. §2113(a). Nevertheless, we briefly describe the robberies.

1. Count One

A bank teller at First Fidelity Bank on Fifth Avenue testified that she was working at the bank on November 20, 1995, when Mosley approached her window, leaned toward her and said "This is a hold up." He then said "open your bottom drawer and give me all the big bills, start with the big bills first." The teller testified that she was nervous, lost bladder control, and threw the money on the counter. When she asked Mosley if she could go to the bathroom, he replied, "Hurry, hurry, open the drawer and give me the big bills first." She testified that Mosley "gestured to his coat as if he had something there." After throwing the money on the counter, the teller ran to the head teller and stated "I just been held up, I just been held up."

On cross-examination, the teller testified that after giving Mosley the money, she locked the drawer and started to walk toward the bathroom. When the police interviewed her

on the day of the incident, she did not indicate that Mosley had a weapon in his possession.

FBI Special Agent Carolyn Zimmer testified that she interviewed the teller shortly after the robbery and prepared a report regarding the robbery. In that report, Zimmer stated that the teller walked away from her station after the robbery, that Mosley had a "sickly appearance," and that he told the teller that he was "sick."

FBI Special Agent John Conway testified that he arrested Mosley on November 20, 1995, after the robbery charged in count one of the indictment. He stated that Mosley said to him "We robbed the bank, First Fidelity Bank." Conway testified that he never asked Mosley what he meant when he said "rob" and that there was nothing in his report of the robbery regarding threats, force or intimidation. Conway also testified regarding the bank surveillance video tape of the robbery and that it did not reveal evidence of threats, force, intimidation or violence.

Reverend Louis McDowell testified that he was a customer in the bank on November 20, 1995, and was standing directly behind Mosley. McDowell indicated that he did not see Mosley make any motions toward the teller, nor take any actions that he would characterize as indicative of force or violence. He testified that after the robbery Mosley walked past him and out of the bank and that the teller walked away from her station.

2. Count Two

A teller at the First Fidelity Bank, 1008 Madison Avenue, testified that she was working in the bank on November 9, 1995, when a man with a sign reading "HOLD UP" approached her station. She testified that she was scared and nervous and that Mosley placed both of his hands on the counter and asked her for money by saying "Can I have all your money?" The teller testified further that Mosley used a defensive but demanding tone of voice, but said nothing else to her. When she gave Mosley "bait money," he threw it back at her. She then gave Mosley the other money, and Mosley walked away at a fast pace.

On cross-examination, the teller testified that she did not tell either the Paterson police or the FBI agents that she

saw Mosley with a weapon, and she told both that Mosley's hands were visible to her throughout the robbery, which lasted approximately five seconds. The teller testified also that Mosley appeared to be homeless, had bags under his eyes, and seemed to be about 60 years old.

Conway testified regarding the surveillance videotape regarding count two of the indictment, as well. He stated that the videotape revealed that Mosley displayed both of his hands on the counter throughout the robbery and that during the three or four seconds of the robbery the videotape did not show Mosley using force, violence or intimidation.

The Paterson police officer who interviewed the teller after the robbery reported that Mosley had not brandished any weapon, and that during the interview, just 16 minutes after the robbery, the teller did not appear to be upset. The teller working at the station adjacent to the teller approached by Mosley testified that she did not see or hear anything alerting her to the robbery while it was occurring.

III. DISCUSSION

As we have indicated, Mosley acknowledges that he entered the banks and took money as alleged in counts one and two of the indictment. He argues, however, that the court's refusal to charge the jury at his request that it could convict him of bank larceny eliminated his defense that his conduct did not satisfy the required elements of bank robbery.

Mosley argues that he was entitled to a charge that the jury could convict him of bank larceny as a lesser included offense because "every defendant is entitled to have his theory of the case, if it could amount to a legally sufficient defense, based upon the evidence presented at trial, fairly submitted to the jury. . . and that a trial court is bound to give the substance of the requested instruction relating to any defense theory for which there is any foundation in the evidence." Br. at 18. Thus, he relies on the general rule that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Matthews v.*

United States, 485 U.S. 58, 63, 108 S.Ct. 883, 887 (1988). The government, though recognizing that a defendant is entitled to a charge on a lesser included offense if justified by the evidence, urges that bank larceny is not a lesser included offense of bank robbery. It therefore contends that the district court correctly rejected Mosley's request to charge bank larceny.

The district court found that

> [t]here simply are no facts in evidence to justify a bank larceny charge. . . . Clearly, there is no basis to suggest that this money was taken with the compliance of these tellers. . . . The evidence is clear that the money was in the cash drawers. As a result of his approach to each of the tellers, they were forced, through intimidation, to retrieve the money from the cash drawers and push it at him. There is nothing to suggest that this was a larceny as that term is used in [section] 2113(a)[sic].

App. at 298.

Our approach in this case is different from that of the district court, as we decide the case predicated on the law rather than on an absence of proof to justify a larceny instruction to the jury. Fed. R. Crim. P. 31(c) permits a jury to return a verdict of guilty as to an offense "necessarily included in the offense charged." However, this rule applies only where the elements of the lesser offense are a subset of the elements of the greater offense. "Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c)." *Schmuck v. United States*, 489 U.S. 705, 716, 109 S.Ct. 1443, 1450 (1989). This standard involves a textual comparison, looking solely to the elements of the two offenses; inferences arising from the evidence and similarities as to the interests served by the statutes are not relevant. *Id.* at 720, 109 S.Ct. at 1452-53.

We begin, then, by looking to the text of section 2113 which provides that:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence

> of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association: . . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or in such savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both. . . .

18 U.S.C. §§ 2113(a) & (b).[2] It is obvious that the definition of bank robbery in subsection (a) does not include an element that the defendant have the "intent to steal or purloin." On the other hand, bank larceny as defined in subsection (b) includes this element. A defendant has the intent to steal or purloin if he intends permanently to deprive the rightful owner of the property. *See United States v. Goldblatt*, 813 F.2d 619, 625 (3d Cir. 1987). Thus, we must determine whether the "steal or purloin" provision is included impliedly as an element of bank robbery in subsection (a). If it is not, bank larceny includes an element not included within bank robbery and thus, under *Schmuck*, is not a lesser included offense of bank robbery.

We have held that the subjective intent of a bank robber to steal is irrelevant: "the crime is his resort to force and violence, or intimidation, in the presence of another person to accomplish his purposes." *United States v. Brown*, 547 F.2d 36, 39 (3d Cir. 1976) (citations omitted). Thus, it is "immaterial for section[ ] 2113(a) . . . whether the subjective intent of a bank robber is to steal that to which he has no claim or to recover his own deposit." *Id.* In contrast,

2. The presence of a threshhold "exceeding $1,000" in the quoted paragraph of 18 U.S.C. § 2113(b) does not add an element to the offense of bank larceny not present in bank robbery because the next paragraph of section 2113(b) imposes a less severe sentence in those cases "not exceeding $1,000."

> however, section 2113(b) specifically requires intent to steal or purloin to satisfy the elements of bank larceny. Given this holding in *Brown*, it seems clear that bank larceny cannot be a lesser included offense of bank robbery under the Supreme Court's strictures in *Schmuck*, which indicates that "offenses are statutorily defined." *Schmuck*, 489 U.S. at 71, 109 S.Ct. at 1451.

Nevertheless, while it seems clear to us that bank larceny is not a lesser included offense of bank robbery, there is a conflict among the courts of appeals on this point and, as we pointed out above, the weight of authority is against our position. In these circumstances, we review the cases from the other courts of appeals. We start with *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir. 1989), which reached our result that under *Schmuck*, bank larceny is not a lesser included offense of bank robbery. *Gregory* reached this result because "[b]ank larceny . . . contains a specific intent element which need not be proved in the bank robbery context . . . . [Hence] bank larceny cannot be 'necessarily included' in bank robbery." *Id.* at 734. Thus, we are not alone in our holding on this appeal.

We are particularly impressed by the insightful discussion of the issue in *United States v. Brittain*, 41 F.3d 1409 (10th Cir. 1994). While ultimately holding that bank larceny is a lesser included offense of bank robbery, the court expressed its hesitance to do so.[3] Accordingly, notwithstanding its actual holding, we find support in the *Brittain* court's extensive analysis supporting a conclusion

3. The *Brittain* court so held because it found itself bound by its previous holdings. Yet it clearly indicated that it might not have reached its holding in the absence of binding precedent. In fact, a fair reading of *Brittain* confirms that a majority of the court believed that bank larceny is not a lesser included offense in a bank robbery case. Judge Brown, who wrote the majority opinion, made it clear that he reached the contrary conclusion only because of circuit precedent. Judge Baldock dissented on the ground that *Schmuck* rejected the reasoning in the circuit precedent. In his view, *Gregory* set forth the correct analysis under *Schmuck*. *Brittain*, 43 F.3d at 1417 (dissenting opinion). Only Judge Ebel apparently thought that, even using a *Schmuck* analysis, bank larceny was a lesser included offense of bank robbery. *Id.* at 1416 (concurring opinion).

contrary to its holding. As the *Brittain* court explained, "[f]irst and foremost, the language of §2113 calls into question [the] conclusion that bank robbery contains all the elements of bank larceny." *Id.* at 1412-13. The *Brittain* court focused specifically on the "intent to steal or purloin" element that is contained in bank larceny but not bank robbery. The decisions that find bank larceny a lesser included offense must infer that intent to steal or purloin is also an element of bank robbery. Also, while section 2113(b) requires a showing of taking and carrying away of money or property, section 2113(a) does not include the carrying away language.

The *Brittain* court also discussed the history of section 2113 to illustrate its reluctance to hold that bank larceny is a lesser included offense of bank robbery. The court recognized that there is no indication in the legislative history that Congress intended section 2113(a) to contain an "intent to steal" element identical to section 2113(b). *Id.* at 1413. The court explained that Congress initially passed the bank robbery legislation in 1934, and, though both robbery and larceny provisions were proposed, the larceny provision was deleted from the legislation. Congress added a larceny provision three years later in reaction to a case in which a man walked into a bank and, without confronting any bank employees, helped himself to $11,000. *Id.* at 1413 (citing *Bell v. United States*, 462 U.S. 356, 365 n.4, 103 S.Ct. 2398, 2403 n.4 (1982) (Stevens, J., dissenting)). Thus, the larceny statute seemed designed to address a different factual scenario than the typical bank robbery case.

We recognize that there is another conceivable reading of the development of the legislation. Inasmuch as both robbery and larceny were offenses at common law, it might be argued that Congress intended to incorporate the intent element of the common law crimes into section 2113.[4] However, there is no indication in the legislative history

4. The *Brittain* court questioned the plausibility of this argument in light of the Supreme Court's statement in *Bell v. United States*, 462 U.S. at 360, 103 S.Ct. at 2401, that the phrase "with intent to steal or purloin" in subsection 2113(b) "has no established meaning at common law." *Brittain*, 41 F.3d at 1413.

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that Congress so intended. The *Brittain* court suggested that an "intent to steal" element within the bank robbery provision would have been implied more easily from the bank robbery statute as it originally was written, as that version included an element of "feloniously" taking property. The term felonious could have been understood as including an intent requirement. *Brittain*, 41 F.3d at 1413. However, when Congress revised the criminal code in 1948, it deleted the word "feloniously" from section 2113(a). The Revisor's Notes indicate that this was considered only a "change in phraseology." *Brittain*, 41 F.3d at 1414 (citing *Prince v. United States*, 352 U.S. 322, 326 n.5, 77 S.Ct. 403, 406 n.5 (1957)). And though it seems that the deletion of "feloniously" was a result of Congress' effort to delete references to felonies and misdemeanors from the code, inasmuch as both terms were defined in 18 U.S.C. §1 (repealed), Congress' failure to give some indication that intent was to remain an element of bank robbery may provide support for the proposition that intent was not conceived as an element of the crime. *See United States v. Richardson*, 687 F.2d 952, 957 (7th Cir. 1982).

Thus, the *Brittain* court found that the history of the statute mandated against a finding that bank larceny is a lesser included offense of bank robbery. Accordingly, at most, the revisions to the criminal code provide minimal guidance as to the meaning of section 2113. For this reason, we find even more helpful to our conclusion that bank larceny is not a lesser included offense of bank robbery, the combination of both the literal words of the statute and the factual history underlying the enactment of the larceny statute.

We recognize that the Courts of Appeals for the First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have held, or at least indicated, that bank larceny is a lesser included offense of bank robbery. *See United States v. Henson*, 945 F.2d 430, 440 (1st Cir. 1991) (stating that "failure to instruct on the lesser charge of bank larceny" not plain error); *United States v. Carter*, 540 F.2d 753, 754 (4th Cir. 1976) (holding that court must instruct jury on lesser included offense of bank larceny where there is factual dispute as to existence of force and violence or intimidation

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but affirming because evidence did not require larceny instruction); *United States v. Walker*, 75 F.3d 178 (4th Cir.) (same), *cert. denied*, 116 S.Ct. 2513 (1996); *United States v. Flint*, 534 F.2d 58, 60 (5th Cir. 1976) (affirming district court's refusal to give instruction on lesser included offense of bank larceny because there was no factual dispute as to the presence of intimidation or violence but indicating that bank larceny is a lesser included offense in a bank robbery indictment); *United States v. Perry*, 991 F.2d 304, 307 (6th Cir. 1993) ("[T]he court declined to instruct the jury on the lesser included offense of bank larceny, 18 U.S.C. § 2113(b)."); *United States v. Cady*, 495 F.2d 742, 747-48 (8th Cir. 1974) (recognizing that bank larceny is a lesser included offense of bank robbery under section 2113); *United States v. Brittain*, 41 F.3d 1409; *United States v. Comillie*, 92 F.3d 1108, 1110 (11th Cir. 1996) (acknowledging, without discussion, that bank larceny is a lesser included offense of bank robbery).[5] In our view, these opinions are not consistent with the methodology of *Schmuck*. Therefore, we reject the majority view that bank larceny is a lesser included offense of bank robbery.

IV. CONCLUSION

In view of the aforesaid, we hold that the district court's refusal to grant Mosley's request for a jury instruction on bank larceny was proper as bank larceny is not a lesser included offense of bank robbery.[6] We accordingly will

5. The Court of Appeals for the Seventh Circuit has conflicting holdings on this issue. In 1969, the court held that "[t]his is not an instance of 'lesser-included offense' which would have entitled defendant to the jury instruction he sought, since the commission of either crime is made unlawful by the same statutory section and one is not 'lesser' than the other." *United States v. Hephner*, 410 F.2d 934 (7th Cir. 1969). In contrast, the court held in 1996 (without reversing or even commenting on the earlier holding) that "[a]s an element of the crime of bank robbery, 18 U.S.C. § 2113(a), the government must prove that the accused committed the crime by force and violence, or by intimidation. This element is missing from the lesser included crime of bank larceny under 18 U.S.C. § 2113(b)." *United States v. Sandles*, 80 F.3d 1145, 1147 n.1 (7th Cir. 1996).

6. We recognize that our result will mean that if a jury concludes that a defendant did not use force and violence or intimidation in a bank

affirm the conviction and sentence of the district court entered December 11, 1996.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

robbery case, but nevertheless intended to steal or purloin the property or money, it must acquit the defendant if the indictment is only for bank robbery. We, however, express no view on whether a grand jury may indict a defendant for both bank robbery and bank larceny by reason of a single incident, as that issue is not involved here. Finally, we note that Mosley does not contend that the evidence cannot support the bank robbery conviction on count one.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
ALFRED J. LECHNER, JR.
JUDGE

MARTIN LUTHER KING JR.
FEDERAL BUILDING & U.S. COURTHOUSE
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21 January 1997

NOT FOR PUBLICATION

LETTER-OPINION
ORIGINAL FILED WITH THE CLERK OF THE COURT

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ORIGINAL FILED
JAN 21 1997
WILLIAM T. WALSH, CLERK

Re: United States v. Sylvester Mosley
Criminal Action No. 96-12 (AJL)

Counsel:

A two count indictment (the "Indictment") was filed on 4 January 1996 against the defendant, Sylvester Mosley ("Mosley"). Both counts of the Indictment charged Mosley with bank robbery, in violation of 18 U.S.C. § 2113(a).[1] On 5 March 1996, following

[1] Section 2113(a) provides, in relevant part,

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management or possession of, any bank, credit union, or any savings and loan association ... shall be fined under this title or imprisoned not more than twenty
> (continued...)

a jury trial, Mosley was found guilty on both counts. Mosley filed a notice of motion for a new trial, pursuant to Fed.R.Crim.P. 33 (the "Motion for a New Trial"), and for judgment of acquittal, pursuant to Fed.R.Crim.P. 29 (the "Motion for Acquittal").[2]

Mosley is subject to a maximum prison sentence of twenty years for violation of 18 U.S.C. § 2113(a). See 18 U.S.C. § 2113(a). The presentence investigation report (the "Presentence Report") classified Mosley as a career offender. Presentence Report, ¶ 57. The Presentence Report stated that, pursuant to the United States Sentencing Guidelines (the "Guidelines") and

[1](...continued)
years, or both.

18 U.S.C. § 2113(a).

[2] On 5 March 1996, Mosley moved for judgment of acquittal following the close of evidence at trial. That motion was denied.

On 12 March 1996, Mosley filed Notice for the instant Motion for a New Trial and Motion for Acquittal. Mosley indicated he would be submitting a memorandum of law in support of the motions. See Notice of Motion, filed 12 March 1996. Mosley filed his memorandum of law on 20 November 1996. See, infra, note 5 for description of submissions.

The Government response was filed 26 November 1996. See, infra, note 5 for description of submissions.

"based on a total offense level of 32 and a criminal history category of VI, the guideline range for imprisonment is 210 to 262 months." Presentence Report, ¶ 158.[3]

Mosley did not object to his classification as a career offender. See Sentencing Transcript ("Sentencing Tr.") 10-11. Mosley, however, moved for a downward departure pursuant to 18 U.S.C. § 3553 and U.S.S.G. §§ 5K2.0 and 5H1.4 based upon his physical condition (the "Motion for Downward Departure"). Mosley is HIV positive and has Acquired Immune Deficiency Syndrome ("AIDS"). Mosley was sentenced on 9 December 1996.[4] For the reasons set forth below, the Motion for a New Trial, the Motion for Acquittal and the Motion for Downward Departure were denied.[5]

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[3] The Government did not object to the recommendations of the Presentence Report if Mosley was sentenced as a career offender. If Mosley was not sentenced as a career offender, however, the Government requested an upward departure based upon Mosley's inadequate criminal history. Because Mosley did not object to his career offender status either in his pre-sentencing submissions or at sentencing, it is not addressed in this opinion.

[4] The sentencing was originally scheduled for 30 May 1996, but was adjourned upon the request of counsel for Mosley. The filing of this opinion was delayed because the sentencing transcript could not be obtained until 3 January 1997.

[5] In support of his motions, Mosley submitted: Defendant's Memorandum of Law in Support of Defendant's Motions for a New Trial, Pursuant to (continued...)

Facts

On 9 November 1995, the Paterson branch of the First Fidelity Bank was robbed by an unknown black male, who was approximately 60 years old and "homeless looking." See Trial Transcript ("Tr."), 133, 145. The bank robber approached a teller, held up a note reading "HOLD UP," in capital letters and, in a demanding tone, directed the teller to give him all her large bills. Tr. 134-38. The teller attempted to give the bank robber bait money,[1] but he proceeded to throw it back. Tr. 135. The teller handed the bank robber $2,547.30 in unmarked currency

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[5] (...continued)
Fed.R.Crim.P. 33 and for a Judgment of Acquittal as to Count II of the Indictment, Pursuant to Fed.R.Crim.P. 29(c) ("Defendant's Motion Brief"), with Exhibits A through B attached; 20 November 1996 Letter Brief in Support of Downward Departure ("Defendant's Departure Brief"), with Exhibits A through B attached.

In opposition to the motions, the Government submitted: Memorandum of the United States in Opposition to Defendant Sylvester Mosley's Motions for (1) A New Trial, (2) A Judgment of Acquittal on Count Two of the Indictment and (3) A Downward Departure in Sentence ("Government's Opposition Brief"). The Government also submitted a letter brief, dated 6 September 1996, in support of upward departure if Mosley was not sentenced as a career offender.

[1] Bait money is security money with serial numbers on it that can be traced if used. Tr. 135.

and he quickly walked away. Tr. 136; Presentence Report, ¶ 11. The teller testified that throughout the incident she felt very scared and nervous. Tr. 134. After the bank robber left the bank, the teller informed her supervisor that she had been robbed. Tr. 137. Pursuant to a photo line-up, which occurred on 15 November 1995, the teller identified Mosley as the person who robbed her.[7] Presentence Report, ¶ 12.

On 20 November 1995, the Federal Bureau of Investigation (the "FBI") was notified of a second bank robbery, which occurred at another branch of the First Fidelity Bank in Paterson. Id., ¶ 13. The teller involved in that incident later identified Mosley from a photo line-up as the bank robber. Id., ¶ 15.

The teller testified Mosley approached her and stated: "This is a hold-up.... Open your bottom drawer and give me all the big bills, start with the big bills first." Tr. 107. The teller testified that Mosley gestured to his coat as if he had a weapon. Id. at 107-108. After handing over $9,334.81, the teller told Mosley she had to go to the bathroom, locked her teller drawer, and began walking to the bathroom where she "urinated uncontrollably due to fear." Presentence Report, ¶ 14. The

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[7] The 9 November 1995 incident constitutes Count II of the Indictment.

teller testified she felt nervous and frightened.[8] Tr. 107, 111.

In post-arrest statements, Mosley implicated two other individuals: Ronald Hammond, who was involved in the 9 November 1995 bank robbery, and Gerald Woodhouse, who was involved in the 20 November 1995 bank robbery. Presentence Report, ¶¶ 16-19. Neither Hammond nor Woodhouse was charged. Id., ¶ 21.

A. Motion for New Trial

Mosley filed a notice of motion for a new trial, pursuant to Fed.R.Crim.P. 33 ("Rule 33").[9] Discretion is employed in the decision of whether to grant a new trial. Government of Virgin Islands v. Lima, 774 F.2d 1245, 1250 (3d Cir. 1985); United States v. Adams, 759 F.2d 1099, 1108 (3d Cir.), cert. denied, 474 U.S. 971 (1985); United States v. Bujese, 371 F.2d 120, 124-25 (3d Cir. 1967).

A court may grant a new trial pursuant to Rule 33 if it is so required in the interest of justice. Rule 33. The grant of a new trial is appropriate when failure to do so would result in an

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[8] The 20 November 1992 incident constitutes Count I of the Indictment.

[9] Rule 33 provides, in relevant part, that

> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.

Rule 33.

injustice. Mosley submits a new trial is appropriate because of the admission of certain evidence which "was relevant only, for the impermissible purpose[], of proving 'criminal disposition'...." Defendant's Motion Brief at 5-6. Mosley contends this evidence was unduly prejudicial. Id. at 6.

Mosley objected to the admission of Government Exhibit 118 "Exhibit 118"). This exhibit referenced an earlier conviction of Mosley for a 1991 robbery of the same First Fidelity Bank alleged in Count II of the Indictment. Government's Opposition Brief at 3. Mosley entered a plea of guilty to this charge in October 1993. Defendant's Motion Brief at 3. Exhibit 118 consists of three pages and indicates the following:

> Count I - Custody of the Commissioner of the Department of Corrections for [seven] years. Said sentence to run concurrent with violation of probation. SCCP $75.00. Said sentence to run concurrent with sentence on 91-06-0980.
>
> ...
>
> Aggravating Factors: Risk that defendant will commit another offense.
> Extent of defendant's prior criminal record.
> Need for deterring defendant and others.
>
> Mitigating Factors: None[.]

See Exhibit 118, attached as Exhibit A to Defendant's Motion Brief and Government's Opposition Brief.

Before trial in the instant matter, the Government moved for an in limine ruling on the admissibility of Exhibit 118. Decision was reserved until the time at which Exhibit 118 was to be offered. Tr. 4-8. At trial, Mosley objected to the admission of Exhibit 118 pursuant to Fed.R.Evid. 404(b) ("Rule 404(b)") and Fed.R.Evid. 403 ("Rule 403"), on the ground that the connection was "five years old, it's remote, it's not relevant... and the prejudice has the potential to overwhelm any appropriateness as to what [Mosley] may have done five years ago." Tr. 152-53.

Exhibit 118 was found to be admissible. Tr. 153-154. It was determined that Exhibit 118 was "not used for an improper purpose under 404(b).... [but] to demonstrate one of the elements of the offense, that being ... the purpose to intimidate ... as required by the statute." Tr. 153. Under Rule 403, Exhibit 118 was found to be probative, but not unfairly prejudicial. Tr. 153-54 ("It certainly is not unfairly prejudicial and the probative value far exceeds any possible undue prejudice.").

"[A]ll relevant evidence is admissible." See Fed.R.Evid. 402; United States v. Murray, ___ F.3d ___, 1997 WL 1891, *5 (3d Cir. 3 Jan. 1997). Evidence is relevant if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

without the evidence." Fed.R.Evid. 401; Murray, 1997 WL 1891, at *5. The admissibility of certain categories of relevant evidence is limited, however, by Rule 404(b).

Rule 404(b) states that

> Evidence of other crimes ... is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ....

Rule 404(b). Rule 404(b), "viewed as a rule of inclusion rather than exclusion, provides for the exclusion of relevant evidence in certain situations." United States v. Sriyuth, 98 F.3d 739, 745 (3d Cir. 1996) (citing Huddleston v. United States, 485 U.S. 681, 688-89 (1988); United States v. Scarfo, 850 F.2d 1015, 1019 (3d Cir.), cert. denied, 488 U.S. 910 (1988)); United States v. Long, 574 F.2d 761, 766 (3d Cir.), cert. denied, 439 U.S. 985 (1978). Evidence of other crimes, wrongs, or acts offered to prove only that the defendant acted in conformity with those acts must be excluded. If the evidence "was relevant to prove anything else, Rule 404(b) [does] not preclude its admission." Murray, 1997 WL 1898, * 5; Sriyuth, 98 F.3d at 745; United States v. Trains, 871 F.2d 368, 389 (3d Cir.), cert. denied, 493 U.S. 821 (1989).

In Huddleston, the Supreme Court set forth four factors

relevant to determine the admissibility of evidence under Rule 404(b):

> (1) the other crimes evidence must have a proper purpose; (2) the proffered evidence must be relevant under Fed.R.Evid. 104(b); (3) its probative value must outweigh its potential for unfair prejudice under Rule 403 balancing; and (4) the court must charge the jury to consider the other crimes evidence only for the limited purpose for which it is admitted.

Huddleston, 485 U.S. at 691-92.

"The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." Sriyuth, 98 F.3d at 745 (citing Huddleston, 485 U.S. at 686). Once it has been determined that the other crimes evidence is admissible under Rule 404(b), the balancing test of Rule 403 must also be met. Id. "[R]elevant other crimes evidence may be excluded if the probative value of the evidence is substantially outweighed by the danger of undue prejudice." Id. (citing Scarfo, 850 F.2d at 1019 (citation omitted)). The subtle distinction between what is permissible and what is prohibited, as well as the substantial potential of unfair prejudice, requires the exercise of particular care in employing this analysis.

Mosley conceded that he was the individual at the banks. Tr. 152. At issue was whether Mosley intended to use fear or intimidation to take the money. Id. Exhibit 118 demonstrated

that, on previous occasions, Mosley had used intimidation to commit bank robbery. This was probative of his intent, a requisite element of the charges against him. Exhibit 118 was, therefore, appropriately admitted into evidence. Cf. United States v. Himelwright, 42 F.3d 777, 784 (3d Cir. 1994)("in order to admit evidence under the "intent" component of Rule 404(b), intent must be an element of the crime charged and the evidence offered must cast light upon the defendant's intent to commit the crime."') (citing United States v. Kirk, 528 F.2d 1057, 1060 (5th Cir. 1976)); United States v. Hudson, 843 F.2d 1062, 1067 (7th Cir. 1988)(identification of defendant in robbery that occurred twelve days earlier was admissible to prove intent under four part test established by Seventh Circuit;[11] two larcenies were

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[11] The Seventh Circuit test requires

> (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue ..., (3) the evidence is clear and convincing, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

United States v. Rollins, 862 F.2d 1282, 1294 (7th Cir.), cert. denied, 490 U.S. 1074 (1989). The Supreme Court invalidated the third prong of the test in Huddleston. Id. (citing 485 U.S. at 685).

similar and close enough in time to be relevant of intent."); United States v. McCallum, 703 F.2d 1419, 1427 & n.7 (9th Cir.)(evidence of prior bank robbery conviction admissible to prove intent to commit bank robbery under Rule 404(b) and 609), cert. denied, 469 U.S. 920 (1984).

Mosley alternatively contends the statements in Exhibit 118 were unduly prejudicial pursuant to Rule 403 because they revealed to the jury that Mosley was charged with committing a prior bank robbery, Mosley pleaded guilty to the charge, another judge ordered incarceration for seven years, Mosley had violated a prior probationary sentence and Mosley had been sentence to imprisonment for another crime. Defendant's Motion Brief at 5; Sentencing Tr. 4. Mosley did not offer these reasons when he argued against the admission of Exhibit 118 at trial. See Sentencing Tr. 4-6.

In addition, Mosley also now contends the language in Exhibit 118 regarding the aggravating factors, and lack of mitigating factors, was unfairly prejudicial. Mosley now argues it was prejudicial to admit the exhibit which stated there was a "risk that [Mosley] will commit another offense," referred to "[Mosley's] prior criminal record," and suggested the "need for deterring [Mosley] and others." Defendant's Motion Brief at 6; Sentencing Tr. 5. Exhibit 118 also states that there are no

mitigating factors to be considered in sentencing Mosley. Id. Mosley asserts the "inferences to be gleaned from ... Exhibit 118 deal purely with [the] propensity to commit crimes...." Defendant's Moving Brief at 6; Sentencing Tr. 5-6.

None of this language was objected to when the document was offered into evidence at trial -- nor at any other time before this post-trial motion was filed. At trial, Mosley objected only on the ground that Exhibit 118 was too remote in time and, therefore, was unduly prejudicial pursuant to Rule 404(b) and Rule 403. Mosley did not object to the content of Exhibit 118, but rather argued that because it concerned an event that occurred five or six years earlier, it was not relevant. Tr. 152. Accordingly, the Government contends this objection on the content of Exhibit 118 is untimely and, therefore, waived. Government's Opposition Brief at 4-6. The Government submits that, if Mosley had objected to its content earlier, the Government would have agreed to admit Exhibit 118 in redacted form. Id. at 6. In substance, the Government argues Mosley made a tactical decision at trial to limit his objection and, therefore, the other objections are waived.

Fed.R.Evid. 103(a)(1) ("Rule 103") required Mosley to make a

timely objection.[11]

> The requirement of a timely objection promotes judicial economy by enhancing the trial court's ability to remedy the asserted error. If a party fails to object in a timely fashion, the objection is waived and we will review the admission of evidence only for plain error.

Government of Virgin Islands v. Archibald, 987 F.2d 180, 184 (3d Cir. 1993)(citing United States v. Young, 470 U.S. 1, 13-14 1985); United States v. Warr, 793 F.2d 551, 555 3d Cir. 1986)).

A party must raise an objection as soon as the party knows or reasonably should know of the grounds for objection. Id. (citing United States v. Gibbs, 739 F.2d 838, 849 (3d Cir. 1984) (in banc), cert. denied, 469 U.S. 1106 (1985)). Where party fails to make timely objection to an evidentiary ruling, review of that ruling is for plain error. Fed.R.Evid. 103(d); United States v. Leo, 941 F.2d 181, 193 (3d Cir. 1991). "Plain errors are those errors that 'seriously affect the fairness, integrity

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[11] Mosley argued at sentencing that "he did not recite the exact language" to which he now objects, but, rather, that his "objection was a general objection." Sentencing Tr. 5. Rule 103(a)(1) states,

> In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.

Rule 103(a)(1) (emphasis added).

or public reputation in judicial proceedings.'" Lee, 941 F.2d at 193 (citations omitted).

Mosley was provided a copy of Exhibit 118 in pre-trial discovery. Government's Opposition Brief at 5. Mosley was also given a copy of Exhibit 118 in the submissions of the Government in support of its pre-trial motion to admit it into evidence. Id. Mosley was on notice of the contents of Exhibit 118 prior to its admission at trial. Id. As explained, Mosley objected only on the ground that it was too remote in time. Id. Mosley never objected to specific language of Exhibit 118 and did not request that Exhibit 118 be admitted in redacted form.[12]

Assuming the objection was timely presented, however, the admission of Exhibit 118 was not erroneous or unduly prejudicial. As discussed above, the evidence was admitted for a proper purpose -- to prove intent. If admission of Exhibit 118 should have been admitted in redacted form, that error was harmless and did not affect the judgment of the jury.

As discussed, Mosley conceded to being the individual at the bank who took the money from the tellers. Tr. 152. Other evidence connects Mosley to the bank robbery -- photographs,

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[12] Although Mosley repeated his objection to Exhibit 118 later in the trial, see Tr. 194, the objection failed to focus attention on the language in the exhibit.

testimony of both tellers and a confession. Government Brief at 7. Exhibit 118 was offered to demonstrate Mosley's intent to intimidate. Tr. 153.

There was neither testimony nor comment as to the portion of Exhibit 118 that Mosley now places in issue. No portion of Exhibit 118 that is now objected to by Mosley was referenced in closing arguments.[13] Exhibit 118 was sent to the jury at the close of the case with other exhibits.

Based on the extensive inculpatory evidence presented, it is highly improbable that Exhibit 118 improperly contributed to the conviction by the jury because of the language to which Mosley now objects. See United States v. Sokolow, 91 F.3d 396, 407 (3d Cir. 1996)(quoting United States v. Simon, 995 F.2d 1236, 1244 (3d Cir. 1993)) "Trial error is harmless if it is highly probable that the error did not affect the judgment."). Cf. United States v. Casoni, 950 F.2d 893, 918 (3d Cir. 1991)(citing Government of Virgin Islands v. Toto, 529 F.2d 278, 284 (3d Cir.

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[13] Mosley submits Exhibit 118 was highlighted in the Government's closing argument, which stated, in part, "Again, the Government has placed into evidence [E]xhibit 118, which is a judgment of conviction in this case and you'll have the chance to examine it." Tr. 283. Although the Government referenced Exhibit 118 in closing argument, the language of the exhibit to which Mosley now objects was neither quoted nor referenced.

1976).

In addition, during jury selection,[17] Tr. 51-52, and in the charge to the jury,[18] Tr. 327-28, the jury was cautioned to use

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[17] During jury selection, the following inquiry was posed to the jurors,

> [Y]ou may learn during the course of this trial that the defendant has been previously convicted of a crime. That evidence will be offered to show the intent of the defendant in committing the crimes with which he is charged in this case. It's proper to use such evidence only to decide whether the defendant intended to intimidate the bank tellers in order to take the money from the bank. Such evidence can be used only for a limited purpose.
>
> It may not be used to conclude the defendant is a bad person or that he was predisposed to do a bad thing. Is there anyone among you who would not be able to follow such instruction or who would feel that because of a previous criminal conviction, the defendant is more likely to have committed the crimes charged in this case?

Tr. 51-52.

[18] The following pre-deliberation jury instruction was also given to the jury,

> Now, the United States has offered evidence that Mr. Mosley was convicted of a bank robbery in the past. This evidence was presented during the testimony of a witness and introduced through that judgment of conviction which you will have with you in the jury room. This has been offered to show
>
> (continued...)

the evidence only for the specific purpose of proving intent. The jury is presumed to have followed the instruction. See United States v. DiSalvo, 34 F.3d 1204, 1223 (3d Cir.

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[18](...continued)

> the defendant's intent in committing the crimes with which he has been charged.
>
> With respect to the prior conviction, the United States has offered this evidence to prove that the defendant knowingly and willfully used intimidation to take from a teller money belonging to and in the care, custody, control, management and possession of the First Fidelity Bank on the 9th of November, and November 20, 1995. It's the position of the United States that this conviction, as well as other pieces of evidence, demonstrate Mr. Mosley's intent to intimidate the bank tellers at the time of the crimes charged.
>
> Now, it's proper to use this evidence to decide whether or not Mr. Mosley intended to intimidate the bank tellers. Should you chose to believe the evidence presented about the defendant's prior conviction for bank robbery, I caution you, you may use it only — you may use and consider this evidence only for the limited purpose I just described.
>
> You may not use it to conclude the defendant is a bad person or that he was predisposed to do bad things. Therefore, you should only consider this evidence for the purpose ... I just discussed with you and in conjunction with these instructions. I stress, to consider the evidence for any other purpose would be improper.

Tr. 327-28.

1994)(citations omitted).

Based on the totality of the evidence presented in this case and the jury instruction given (to which no objection was offered), it is speculative, at best, to conclude the jury was improperly influenced by the portions of Exhibit 118 objected to by Mosley. The Motion for a New Trial was denied at sentencing. Sentencing Tr. 8.

B. Judgment of Acquittal

Following the close of evidence on 5 March 1996, Mosley moved for judgment of acquittal as to both counts of the Indictment on the ground that there was insufficient evidence to establish the elements for either charge of bank robbery. Tr. 254. Mosley argued the evidence was insufficient for a jury to find that Mosley intended to take the money by force, violence or intimidation. See Tr. 254-62. The motion for acquittal was denied at that time. Tr. 261. It was determined there was sufficient evidence to support the jury finding of intimidation. Id. at 261-262.

The instant Motion for Acquittal, filed by Mosley within seven days of the verdict,[6] returned to the issue of whether the

[6] As noted, Mosley did not file a brief in support of the Motion for Acquittal, or the Motion for New Trial until 20 November 1996. See, supra, (continued...)

Government established, beyond a reasonable doubt, each element of the crime as to Count II of the Indictment (the 9 November 1995 Bank Robbery). Defendant's Motion Brief at 8. Mosley argued the Government failed to prove the use of "force and violence, or by intimidation" to commit the robbery as required by 18 U.S.C. § 2113(a). Id. at 9.

In deciding whether a judgment of acquittal should be rendered, it must be determined whether, "viewing the evidence in a light most favorable to the government, there was substantial evidence" to support the finding of the jury of guilt beyond a reasonable doubt as to each element of the crime charged. See Sriyuth, 98 F.3d at 750 (citations omitted); United States v. Pecora, 798 F.2d 614, 618 (3d Cir. 1984), cert. denied, 479 U.S. 1064 (1987) (citing Government of the Virgin Islands v. Williams, 739 F.2d 936, 940 (3d Cir. 1984)); see also United States v. Objalo, 23 F.3d 69, 71-72 (3d Cir. 1994)(citing United States v. Pungitore, 910 F.2d 1084, 1128-29 (3d Cir. 1990), cert. denied, 500 U.S. 915 (1991)); United States v. Rieger, 942 F.2d 230, 232 (3d Cir. 1991). "The Government must be given the benefit of inferences that may be drawn from the evidence, and the evidence may be considered probative even if it is circumstantial." Id.

[6](...continued) note 2.

Mosley argued the Government did not prove force, violence or intimidation with regard to the 9 November 1995 Bank Robbery. In support of this argument, Mosley referred to the testimony of the teller. The teller testified she never told the police or the FBI during their investigation that she saw a weapon; she also testified Mosley's hands were visible to her. Tr. 142.

The teller testified the incident only lasted five seconds and that Mosley appeared to be homeless, had bags under her eyes and appeared to be 60 years old. Tr. 143, 145.

Mosley also referred to the testimony of FBI Special Agent John Conway ("Conway"). Conway testified he arrested Mosley, Tr. 161, he discussed the allegations in the case with Mosley, Tr. 166, and he wrote a detailed report of the interview of Mosley. Tr. 166-167. Conway testified the report contained nothing about force, violence or intimidation on the part of Mosley. Tr. 168-69.

Conway also testified as to the contents of a bank surveillance videotape which recorded the 9 November 1995 Bank Robbery. Tr. 190-202. Conway testified Mosley displayed both hands to the teller and the videotape did not reveal any evidence of violence or force on the part of Mosley during the four or five seconds that the incident occurred. Tr. 200-203. Mosley also argued there was no testimony that the videotape revealed

evidence of intimidation. Defendant's Motion Brief at 10 (citing Tr. 203).

The evidence, when viewed in the light most favorable to the Government, however, does reveal sufficient evidence to support the jury's finding of guilt. Mosley argued only what certain evidence did not show, not what other evidence did show.

The teller testified she felt "very scared and nervous" when Mosley held up the sign that read "HOLD UP" written in capital letters. Tr. 134. She testified that, when he asked for the money, his tone was demanding. Tr. 135. The teller did not activate the bank alarm and complied with Mosley's directive. Tr. 135. The teller testified she tried to give him bait money and felt scared when Mosley threw it back at her. Tr. 135-36. The teller also testified she felt scared immediately after the robbery when Mosley left the bank. Tr. 134, 137.

Although Conway testified the bank surveillance videotape did not reveal any force or violence employed by Mosley, Conway did not say the silent videotape was void of evidence of intimidation. Tr. 202-203.

The evidence demonstrated Mosley was convicted of bank robbery five years earlier. Tr. 160-161. This was evidence of intent. Tr. 261. Mosley told the FBI on the day of his arrest that he had robbed the bank, which was evidence of his intent and

understanding, Tr. 136-137, especially in light of his prior involvement with the criminal justice system. In addition, the evidence of intimidation in the Count I robbery "sheds light on his intent to use intimidation in the Count II robbery." Government's Opposition Brief at 11.

In photographic evidence presented in support of Count I, Mosley was depicted as using his hand in his jacket, creating the impression that he was carrying a gun. Tr. 261-262. The teller, testifying as to Count I, stated that Mosley had "gestured to his coat as if he had something there." Tr. 107, 108.

The jury instruction provided a clear framework for the jury to determine the existence or absence of intimidation." Tr.

" The instruction to the jury provided, in relevant part,

> Let me talk to you about the term "by force and violence or by intimidation." Let me define it for you.
>
> That means either, one, the use of actual physical strength or actual physical violence or two, doing some act or making some statement to put someone in fear of bodily harm.
>
> The requirement of taking by force and violence or by intimidation under Section 2113(a) is disjunctive. The Government need only prove force and violence or intimidation to establish this case. It does not have to prove both.

(continued...)

330-331. Mosley did not object to this instruction. The described evidence, together with the jury instruction, was sufficient to support a finding by the jury of guilt as to Count. II of the indictment. The Motion for Acquittal was denied at sentencing. Sentencing Tr. 10.

" ...continued:

> The Government contends in this case that the taking of money was by intimidation. If you so find beyond a reasonable doubt that the money was taken by intimidation, this element of the offense is satisfied.
>
> Now, the word "intimidation" must be caused by an act knowingly and deliberately done and a statement knowingly and deliberately made, willfully made by the defendant or made in such a manner or under the circumstances that would produce such a reaction or such a fear of bodily harm in a reasonable person.
>
> The United States does not have to prove that the behavior of Mr. Mosley was so violent that it was likely to cause terror, panic, hysteria. Further, the United States does not have to prove that the alleged victim was actually frightened.
>
> A taking would not be by means of intimidation, however, if fear on the part of the alleged victim resulted from that person's own timidity rather than from some intimidating conduct on the part of Mr. Mosley. The essence of the offense is the taking of money or property, aided and accompanied by an intentional intimidating behavior on the part of the defendant.

Tr. 330-31.

C. Section 5H1.4 Departure.[18]

Mosley has AIDS. Mosley has requested a downward departure pursuant to 18 U.S.C. § 3553(b) and U.S.S.G. §§ 5H1.4, 5K2.0[19] Defendant's Departure Brief at 1. Under U.S.S.G. § 5K2.0, a departure from the applicable guideline range may be appropriate if "'there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" U.S.S.G. 5K2.0. See also United States v. Schein, 31 F.3d 135, 138 (3d Cir. 1994).

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18 Mosley made several objections to the Presentence Report which do not affect the calculation of the sentencing guidelines. See 3 December Letter of McCauley to Probation Officer (not submitted to the court). Accordingly, they were not considered at sentencing and are not discussed in this opinion.

19 Section 5K2.0 states, in relevant part,

> Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

U.S.S.G. § 5K2.0

Section 5H1.4 states,

> Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g. in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

U.S.S.G. § 5H1.4.

The Third Circuit has not addressed the specific issue of whether a downward departure is justified when sentencing a defendant who is inflicted with AIDS. Other courts which have encountered the issue, however, have denied a downward departure because the condition of the defendant, when sentenced, did not constitute an "extraordinary physical impairment." See United States v. Rabins, 63 F.3d 721, 727-28 (8th Cir. 1995), cert. denied sub nom., ___ U.S. ___, 116 S.Ct. 1031.

In Rabins, the Eighth Circuit found a departure for a defendant who has AIDS was not warranted because, at the time of sentencing, the virus had not "progressed to such an advanced stage that it could be characterized as an 'extraordinary physical impairment.'" 63 F.3d at 728 (citation omitted). The sentencing court considered the defendant's medical records, his testimony concerning his physical condition, the representations of his attorney concerning his physical condition, and his

physical appearance. Id. Based upon these factors, the court determined that no extraordinary physical condition existed. Id. (noting that record was devoid of evidence to demonstrate defendant was taking medication, that prison would worsen his condition or that he required special care).

In United States v. Woody, 55 F.3d 1257 (7th Cir.), cert. denied, ___ U.S. ___, 116 S.Ct. 234 (1995), the defendant, who was not inflicted with "full blown AIDS," failed to present a "sound factual foundation which would support a downward departure for his HIV positive condition." Id. at 1276. See also United States v. Thomas, 49 F.3d 253, 261 (6th Cir. 1995)("AIDS affliction warrants sympathy, but not a departure")(citation and quotations omitted); United States v. DePew, 751 F.Supp. 1195, 1199 (E.D.Va. 1990)(recognizing that the Bureau of Prisons is equipped to handle the medical requirements of the defendant and stating that "terminally ill persons who commit serious crimes may not use their affliction to escape prison"), aff'd, 932 F.2d 324 (4th Cir.), cert. denied, 502 U.S. 873 (1991).

Whether the AIDS virus has advanced to a state warranting a downward departure is a question of fact left to the discretion of the sentencing court. United States v. Strear, 22 F.3d 109,

112 (6th Cir. 1994)(remanding case for factual determination).[28]

Mosley argued the cases which have denied downward departure are inherently flawed. Defendant's Departure Brief at 3. Mosley contended the language employed by the courts demonstrated a limited understanding of the AIDS virus and its health ramifications. Id. Mosley argued that the courts fail to define what is meant by advanced AIDS and ignored the "significant risk factors of an extended incarceration to an HIV-positive individual." Id. Mosley argued the holdings are inconsistent with precedent that allows a sentencing court to downward depart under U.S.S.G. § 5H1.4, even where the physical condition is not life threatening. Id. citing United States v. Greenwood, 928 F.2d 645, 646 (4th Cir. 1991)(downward departure where defendant had lost both of his lower legs); United States v. Little, 736 F.Supp. 71 (D.N.J., aff'd, 919 F.2d 137 (3d Cir. 1991)(downward

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[28] On remand, the court found that the defendant's condition warranted a downward departure to time served. United States v. Strear, 893 F.Supp. 754, 757 (N.D.Ohio 1995). The court, however, refused to depart because it determined that a departure would be inhumane. The court found the defendant had "no assets, no medical insurance or coverage, and no relatives or friends on whom he could rely for comfort during his final days." Id. The court stated: "a downward departure in this case would result in ... leaving [the defendant] to die on the streets without anyone to whom he could turn for assistance or support." Id.

departure due to defendant's chronic pulmonary condition]).[22]

Mosley contended that blood tests reveal a severe decrease in his CD4 count to below 200. At sentencing, counsel for Mosley stated that his most recent blood test revealed a level of 74.[23] See Sentencing Tr. 11. The National Center for Disease Control (the "CDC") has recently expanded its definition of AIDS to include an individual with a CD4 count of 200 or less. Defendant's Departure Brief at 4; but see Streat, 893 F.Supp. at 756 & n.2 (recognizing that, given the scope of the definition of the disease, "[i]t is conceivable that a defendant may satisfy the CDC definition of AIDS without satisfying the burden presented by the Sentencing Guidelines").

Mosley argued that the overcrowded conditions at the prison

---

[22] The facts of those cases are distinguishable from the instant matter. In Greenwood, the defendant, convicted of one count of possession of a firearm by a convicted felon, had also received a two level reduction for acceptance of responsibility. In Little, the defendant was convicted of a misdemeanor offense of embezzlement and received a two month prison sentence. The required period of incarceration was a period of six to twelve months.

[23] Mosley submitted the results of two blood tests, which he attached to the Defendant's Departure Brief as Exhibit A. The latest test indicates a CD4 level of 79 on 29 August 1996. See Exhibit A, attached to Defendant's Departure Brief.

facilitate infectious disease, making him susceptible to infection, especially given "the current resurgence of tuberculosis and ... multi-drug resistant tuberculosis ("MDR-TB")." Defendant's Departure Brief at 6, Exhibit B. Mosley further argued the difficulty in detection and treatment of MDR-TB in HIV-positive individuals pose a serious health risk. Id. at ". Accordingly, Mosley requested a downward departure.

The Government opposed the request on the ground that departure is only available in the presence of extraordinary physical impairment. Government Brief at 13 (citations omitted). The Government argued Mosley has not fulfilled his burden and further argued that, "as bad as prison is, [when Mosley] was arrested, he was homeless, he was using drugs and ... more vulnerable healthwise under those circumstances than if ... in prison." Sentencing Tr. 13.

Mosley appears to suggest any defendant who is afflicted with "full-blown AIDS has an 'extraordinary physical condition' within the meaning of U.S.S.G. § 5H1.4." Defendant's Departure Brief at 4. Once that is determined, Mosley argues "[t]he inquiry ... becomes whether the individual defendant's health risks involved in extended incarceration are too great." Id.

If adopted, the practice suggested by Mosley would seriously affect the deterrent effect of incarceration. To hold that every

Defendant inflicted with AIDS has an extraordinary physical condition within the meaning of U.S.S.G. § 5H1.4, would contravene the deterrent purpose of incarceration. The harm caused would likely be amplified where the defendant, automatically deemed to have an extraordinary physical condition because of AIDS, is convicted of a felony. The proper approach under U.S.S.G. § 5H1.4 is to determine, on a case-by-case basis, whether the individual affliction constitutes an extraordinary physical condition, warranting a downward departure.

Significantly, the evidence Mosley offered for his condition was blood tests demonstrating a decrease in his CD4 count. See Exhibit A, Defendant's Departure Brief. These tests are dated March and August, 1996, and present no prognosis. Id. While acknowledging the availability of discretion to grant a departure, after considering the facts of this case, I declined to do so. The Motion for Downward Departure is denied.

Conclusion

Based on the foregoing, the Motion for a New Trial, the Motion for Acquittal and the Motion for Downward Departure were denied.

ALFRED J. LECHNER, JR., U.S.D.J.

c: Melissa E. Rhoads, Deputy Clerk

State of New Jersey

v.

EXHIBIT 118

Sylvester Hosely

Defendant's Correct Name

New Jersey Superior Court

Essex County

Law Division - Criminal

☒ Judgment of Conviction
☐ Change of Judgment
☐ Order for Commitment
☐ Indictment/Accusation Dismissed
☐ Judgment of Acquittal

11-18-48	DATE OF BIRTH
694318	S.B.I. #
6-30-91	DATE OF ARREST
6-05-91	DATE IND / ACC FILED
6-12-91	DATE OF ORIGINAL PLEA
☒ NOT GUILTY ☐ GUILTY	ORIGINAL PLEA

ADJUDICATION BY: DATE

☒ GUILTY PLEA 10-22-93

☐ JURY TRIAL

☐ NON-JURY TRIAL

☐ Dismissed/Acquitted

ORIGINAL CHARGES

IND / ACC No.	Count	Description	Degree	Statute
91-06-0990-I	1	Robbery	2nd	2C:15-1a(1) or (2)

FINAL CHARGES

Count	Description	Degree	Statute
1	Robbery	2nd	2C:15-1a(1) or (2)

It is, therefore, on October 22, 1993 ORDERED and ADJUDGED that the defendant is sentenced as follows:

Count 1 - Custody of the Commissioner of the Department of Corrections for 7 years.
Said sentence to run concurrent with violation of probation. SSCP $75.00
Said sentence to run concurrent with sentence on 91-06-0980.

DEFENDANT REMANDED TO PRISON CUSTODY

CLASSIFICATION CENTER.

☒ It is further ORDERED that the sheriff deliver the defendant to the appropriate correctional authority.

☒ Defendant is in custody under the above number(s) 221484.

TO BE DETERMINED

☐ Defendant is in custody under other name or other number(s) in Custody (N.J.S.A. 2C:44-5(b)(3))

Total Custodial Term 7 Years Credit CCDC

Total Probation Term

COPIES TO: CHIEF PROBATION OFFICER, STATE POLICE, AGS CRIMINAL PRACTICE DIVISION, DEPT OF CORRECTIONS or COUNTY PENAL INSTITUTION

Pa-47

Total FINE $

Total RESTITUTION $

If the offense occurred on or after December 23, 1991 an assessment of $50 is imposed on each count on which the defendant was convicted unless the sole basis includes a higher assessment pursuant to N.J.S.A. 2C:43-3.1 (Assessment is $30 if offense is on or after January 9, 1986 but before December 23, 1991, unless a higher penalty is noted. Assessment is $20 if offense is before January 9, 1986.)

☒ Assessment imposed on

Count(s) 1st

at $ 50.00 each.

Total VCCB Assessment $ 50.00

☐ Installment payments are due at the rate

of $ _____ per _____

beginning _____ (date)

If the offense occurred on or after February 1, 1993 and the sentence is for probation or for a State Correctional facility, a transaction fee of up to $1.00 is ordered for each assessment when a payment or installment payment is made. (P.L. 1992, c. 169)

Victim Name | Telephone Number | Victim Address

Victim | 201-881-4096 | Dennis Friel, Esq.

STATEMENT OF REASONS

Aggravating Factors: Risk that defendant will commit another offense.
Extent of defendant's prior criminal record.
Need for deterring defendant and others.

Mitigating Factors: None

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL RECORD NOW IN MY CUSTODY.

Richard de Cristofaro

FEB 23 1995

By [illegible] Special Deputy

DONALD R. REENSTRA, J.S.C.

10/22/93

COPIES TO: CHIEF PROBATION OFFICER, STATE POLICE, AGS CRIMINAL PRACTICE DIVISION, DEPT OF CORRECTIONS or COUNTY PENAL INSTITUTION

Pa-48

NEW JERSEY SUPERIOR COURT
PASSAIC COUNTY
LAW DIVISION
(CRIMINAL)

IN THE STATE OF NEW JERSEY | Indictment No. 91 06 0990 |

vs | ROBBERY (Second Degree)

SYLVESTER MOSELY,

Defendant

The Grand Jurors of the State of New Jersey for the County of Passaic upon their oath present that Sylvester Mosely, on or about the 30th day of April 1991 in the City of Paterson in the County of Passaic and within the jurisdiction of this Court, did commit an act of robbery upon Veronica Ellerbee, a teller at the First Fidelity Bank located on Madison Avenue, City aforesaid and in the course of committing the theft did threaten her with or purposely put her in fear of immediate bodily injury, contrary to the provisions of N.J.S. 2C:15-1 a (1) or (2) and against the peace of this State, the Government and dignity of the same.

RONALD S. FAVA
PASSAIC COUNTY PROSECUTOR

Endorsed: A TRUE BILL

BY WILLIAM F. GRADISHER, ASSISTANT PROSECUTOR

MARIE L. MONACO, FOREPERSON

Prosecutor's Docket No. 91-2247 Municipal Docket No. 5483

DEC 09 1995

Pa-49

AO 245 S (Rev. 4/90) Sheet 1 - J[illegible] in a Criminal Case

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA

vs

SYLVESTER MOSLEY
(Defendant's Name)

FILED
DEC 9 1996
AT 8:30 ..... M
WILLIAM T. WALSH
CLERK

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 96-00012-01

Donald McCauley, Esq.
Attorney's Name

ENTERED
on
THE DOCKET
on 12-11 19
WILLIAM T. WALSH, CLERK
By [illegible]
(Deputy)

THE DEFENDANT:

___ plead guilty to count(s) _____.
_X_ was found guilty on count(s) 1 and 2 after a plea of not guilty

Accordingly, the defendant is adjudged guilty of such count(s) which involve the following offenses:

TITLE SECTION	NATURE OF OFFENSE	DATE OF OFFENSE	COUNTS
18:2113 a	Bank Robbery	11/20/95	1
18:2113 a	Bank Robbery	11/09/95	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on counts _____ and is discharged as to such count(s).

___ Count(s) _____ (is/are) dismissed on the motion of the United States.

_X_ It is ordered that the defendant shall pay a special assessment of $ 100.00, for count(s) 1 and 2, which shall be due _X_ immediately ___ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 147-40-6342 or 147-40-6324;147-12-6342;147-40-6345
Defendant's Date of Birth: 11/18/48 or 11/28/48

Defendant's Address
Union County Jail
15 Elizabeth Plaza
Elizabeth, NJ 07202

December 9, 1996
Date of Imposition of Sentence

Signature of Judicial Officer

Hon. Alfred J. Lechner, Jr., U.S.D.J.
Name & Title of Judicial Officer

Certified as a true copy on
This Date: 12/9/96
By Nicole Rhoads
(Deputy Clerk)

Pa-50

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of prisons to be imprisoned for a term of 210 months on each of Counts 1 and 2 to run concurrently.

_ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.
_ The defendant shall surrender to the United States Marshal for this district.

_ at _____ a.m. on _____.
_ as notified by the United States Marshal.

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
_ before a.m/p.m. on _____
_ as notified by the United States Marshal.
_ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____ Defendant delivered on _____ to _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

U.S. GPO. 1990-722-448/10286

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

OR

_ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 32

Criminal History Category: VI

Imprisonment Range: 210 to 262 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 17,500.00 to $ 175,000.00

X Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ 0

X Full restitution is not ordered for the following reason(s):

Inability to pay full restitution.

X The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

_ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s):

OR

The sentence departs from the guideline range

_ upon motion of the government, as a result of defendant's substantial assistance.

_ for the following reasons(s):

• U.S. GPO-1990-722-448/10286

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

AMENDED

UNITED STATES OF AMERICA

vs

SYLVESTER MOSLEY

(Defendant's Name)

ORIG

FILED

JAN 23 1997

At 8:30 ..... M

WILLIAM T. WALSH
CLERK

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 19

Case Number: 96-00012-01

Donald McCauley, Esq.
Attorney's Name

THE DEFENDANT:

___ plead guilty to count(s) _____.

X was found guilty on count(s) 1 and 2 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s) which involve the following offenses:

TITLE SECTION	NATURE OF OFFENSE	DATE OF OFFENSE	COUNTS
18:2113(a)	Bank Robbery	11/20/95	1
18:2113(a)	Bank Robbery	11/09/95	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursu to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on counts _____ and is discharged as such count(s).

___ Count(s) _____ (is)(are) dismissed on the motion of the United States.

X It is ordered that the defendant shall pay a special assessment of $ 100.00, for count(s) 1 and 2, which shall be due X immediately ___ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by thi judgment are fully paid.

Defendant's Soc. Sec. No.: 147-40-6342 or 147-40-6324;147-12-6342;147-40-634
Defendant's Date of Birth: 11/18/48 or 11/28/48

December 9, 1996
Date of Imposition of Sentence

Defendant's Address:
Union County Jail
15 Elizabeth Plaza
Elizabeth, NJ 07202

Signature of Judicial Officer

. Alfred J. Lechner, Jr., U.S.D.J
& Title of Judicial Officer

Date: January 23, 1997

1/23/97

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of prisons to be imprisoned for a term of 240 months on each of Counts 1 and 2 to run concurrently.

__ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.
__ The defendant shall surrender to the United States Marshal for this district.
__ at _____ a.m. on _____.
__ as notified by the United States Marshal.

__ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
__ before a.m/p.m. on _____.
__ as notified by the United States Marshal.
__ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____ Defendant delivered on _____ to _____, with a certified copy of this judgment.

_____
United States Marshal

By_____
Deputy Marshal

U.S. GPO. 1990-722-448/10286

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years on each of Counts 1 and 2 to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant must submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer. If this judgment imposes a restitution obligation, it shall be a conditions of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

1. The defendant shall refrain from the illegal possession and/or use of drugs and shall submit to urinalysis or other forms of testing to assure compliance. It is further ordered that the defendant shall submit to drug treatment on an outpatient or inpatient basis, if directed by the U.S. Probation Office. The defendant shall abide by the rules of the program and shall remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer with 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrest or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record of personal history of characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

U.S. GPO:1990-722-448/10286

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

OR

__ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 32

Criminal History Category: VI

Imprisonment Range: 210 to 262 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 17,500.00 to $ 175,000.00

X Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ 0

X Full restitution is not ordered for the following reason(s):

Inability to pay full restitution.

__ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

X **The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s):**

The defendant's criminal conduct, combined with an extraordinary extensive criminal history, justifies this sentence, and as explained at sentencing.

OR

The sentence departs from the guideline range

__ upon motion of the government, as a result of defendant's substantial assistance.

__ for the following reasons(s):

• U.S. GPO-1990-722-448/10286

ORIGINAL

No. 97-7213

RECEIVED
HAND DELIVERED
FEB 18 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
FEB 18 1998
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SYLVESTER MOSLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

18 pp

QUESTIONS PRESENTED

1. Whether, in a prosecution for bank robbery, the district court erred in not instructing the jury on the offense of bank larceny.

2. Whether the district court abused its discretion in admitting evidence of petitioner's prior bank robbery conviction.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-7213

SYLVESTER MOSLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-14) is reported at 126 F.3d 200.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1997. A petition for rehearing was denied on December 15, 1997. The petition for a writ of certiorari was filed on November 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Pennsylvania, petitioner was convicted on two

counts of bank robbery, in violation of 18 U.S.C. 2113(a). He was sentenced to concurrent terms of 210 months. The court of appeals affirmed. Pet. App. 3-14.

1. On November 9, 1995, petitioner entered the First Fidelity Bank at 1008 Madison Avenue, in Patterson, New Jersey, approached teller Monica Brown and displayed a sign reading "hold up." Brown became very scared and nervous. After petitioner placed his hands on the counter, petitioner said, in a demanding tone, "can I have all your money?" Brown gave petitioner some "bait money." Petitioner threw that money back at her. Feeling very scared, Brown gave him more money. Petitioner then left the bank. Brown reported the robbery to a supervisor. Pet. App. 6; C.A. App. 158-163; Gov't C.A. Br. 3.

On November 20, 1995, petitioner entered the First Fidelity Bank on Fifth Avenue in Patterson, approached teller Janet Neufville, told her, "this is a hold up," and asked for big bills first. Petitioner also made a gesture to his coat as if he had a weapon. Neufville became so upset that she lost bladder control. She threw some money on the counter and then immediately walked towards the bathroom. Neufville was "hysterical" and told another teller that she had just been robbed. Pet. App. 5-6; C.A. App. 130-134.

That same day, FBI Special Agent John Conway arrested petitioner. During an interview, petitioner admitted that he and an accomplice had just robbed a bank. Conway seized some of the bank's money from petitioner's socks. Gov't C.A. Br. 4-5.

2. Petitioner's defense at trial was that he committed only bank larceny, rather than bank robbery, because he did not use force, violence, or intimidation to obtain funds from the banks. On cross-examination, Agent Conway agreed that he could not see force or violence on the November 20 surveillance tape, which showed petitioner robbing the second bank. Agent Conway also stated that he could not "pinpoint" intimidation on the tape, but emphasized that the tape was "not a true depiction" of the events in the bank, in part because it lacked audio. C.A. App. 198-199, 212. Agent Conway did, however, testify that a still photograph from the November 20 tape showed petitioner with his right arm inside his jacket, which was consistent with the teller's testimony that petitioner had made a gesture to his coat as if he had a gun. Id. at 213-214.

The Reverend Louis McDowell testified that he was standing behind petitioner during the November 20 robbery and that he did not hear petitioner say anything to the teller, make any motions, or do anything that could be characterized as force or violence. He admitted that the teller was nervous as she gave petitioner the money. C.A. App. 265-266, 268.

At the close of evidence, petitioner asked for a bank larceny instruction. The district court denied the motion, stating that the evidence did not warrant such an instruction. Pet. App. 8. In particular, the district court held that no reasonable juror could conclude that the tellers had handed petitioner money voluntarily rather than as a result of intimidation:

> There are simply no facts in evidence to justify a bank larceny charge. . . . Clearly there is no basis to suggest that this money was taken with the compliance of these tellers. . . . The evidence is clear that the money was in the cash drawers. As a result of his approach to each of the tellers, they were forced, through intimidation, to retrieve the money from the cash drawers and push it at him. There is nothing to suggest that this was a larceny as that term is used in [Section] 2113[(b)].

Pet. App. 8 (quoting C.A. App. 298); see also C.A. App. 293 ("This money certainly was not given to him because he was entitled to it and the money was certainly not given to him based upon the voluntary conduct of either of these tellers.").

3. The court of appeals affirmed. On appeal, petitioner challenged the failure to give a bank larceny instruction, contending that bank larceny is a lesser included offense of bank robbery. Under Fed. R. Crim. P. 31(c), he argued, he was entitled to an instruction on the lesser included offense.

The court of appeals disagreed, holding that bank larceny is not a lesser included offense of bank robbery. The court of appeals explained that, in Schmuck v. United States, 489 U.S. 705 (1989), this Court had held that the determination of whether one offense is a "lesser included" or "necessarily included" offense of another depends on the elements of the offenses. Where the lesser offense requires proof of an element not required for the greater offense, it is not a lesser or necessarily included offense, and no instruction is required under Fed. R. Crim. P. 31(c). Pet. App. 8.

Applying Schmuck, the court noted that bank robbery does not expressly have an "intent to steal or purloin" element, but that bank larceny does. Nor is an "intent to steal or purloin" element

implied in bank robbery. The court emphasized that, under circuit precedent, the subjective intent of a bank robber is irrelevant; it is sufficient if he resorts to force, violence, or intimidation to achieve his purposes. Pet. App. 8-10. The court recognized that robbery and larceny were greater and lesser offenses at common law, but found no indication in the legislative history of Section 2113 that Congress intended to codify that common law rule in the statute, especially since the bank robbery and bank larceny provisions were adopted at different times. Pet. App. 11-12. The court of appeals noted that cases from other circuits had language suggesting that bank larceny is a lesser included offense, but ultimately concluded that its analysis was consistent with Schmuck. Pet. App. 12-13.

Petitioner also argued that the district court erred in admitting evidence of his prior bank robbery conviction under Rules 404 and 403 of the Federal Rules of Evidence. The court of appeals summarily rejected that contention. Pet. App. 4 n.1.

ARGUMENT

1. Petitioner contends that bank larceny is a necessarily included offense of bank robbery, and that he was therefore entitled to a bank larceny instruction. Pet. 9-11. According to petitioner, there is a circuit conflict on whether the offense of bank larceny is necessarily included in the offense of bank robbery. Id. at 8.

a. As an initial matter, this case does not present an appropriate vehicle for deciding whether bank larceny is a lesser

included offense of bank robbery, because petitioner (like virtually every other bank robbery defendant) would not be entitled to a bank larceny instruction even if bank larceny were a lesser included offense.

Fed. R. Crim. P. 31(c) provides, in part, that a defendant charged with a greater offense "may be found guilty of an offense necessarily included in the offense charged." Rule 31(c) thus may entitle a defendant to a lesser included offense instruction, but only if the evidence would permit a rational jury to convict him of the lesser offense while acquitting him of the greater one. Keeble v. United States, 412 U.S. 205, 208 (1973). Here, the district court properly concluded that no rational jury could find petitioner guilty of bank larceny without also concluding that he was guilty of bank robbery. Pet. App. 8.

Petitioner's contrary claim, correctly rejected by the district court, rests on the assumption that a jury could find that he obtained funds from the banks with intent to steal them -- and thus was guilty of bank larceny -- without also finding that he used intimidation to obtain the funds. Despite petitioner's attempt to solicit witness testimony that they could not "see" intimidation, the evidence showed that intimidation occurred.[1]

[1] Petitioner held up a sign in the first bank saying it was a hold up, United States v. Hopkins, 703 F.2d 1102, 1103 (9th Cir.), cert. denied, 464 U.S. 963 (1983), and threw bait money back at the teller; in the second bank, he gestured to his coat in a way that suggested that he had a concealed gun. See pp. 2-3, supra. Moreover, the evidence showed that both tellers were terrified. One lost control of her bladder, and both testified as to their fear. Pet. App. 36-37.

More important, as the district court properly concluded, no reasonable juror could find otherwise, as there was no evidence to suggest that the tellers handed petitioner thousands of dollars in bank money voluntarily and of their own free will, i.e., without intimidation. Certainly there was no evidence that the tellers were petitioner's accomplices. Pet. App. 8 ("Clearly there is no basis to suggest that this money was taken with the compliance of these tellers"). Nor was there evidence that petitioner filled out a withdrawal slip or performed any other act that would cause a teller voluntarily to hand him cash. C.A. App. 293 ("This money certainly was not given to him because he was entitled to it and the money was certainly not given to him based upon the voluntary conduct of either of these tellers."). To the contrary, the evidence can support only one conclusion: Far from handing petitioner thousands of dollars voluntarily and of their own free will, the tellers handed petitioner the money he demanded because they were intimidated. Pet. App. 8; C.A. App. 293, 298. Because no reasonable juror could reach the contrary conclusion, no bank larceny instruction was required even assuming that bank larceny is a lesser included offense of bank robbery. Ibid.[2]

[2] Because the same analysis will generally apply in bank robbery prosecutions, the question of whether bank larceny is a lesser included offense of bank robbery is largely academic. Cases in which bank robbery defendants are able to present plausible evidence that the tellers handed over money voluntarily, i.e., without intimidation, are infrequent at best. It thus comes as no surprise that the vast majority of cases that even mention this issue uphold the trial court's refusal to give a bank larceny instruction on the ground that it is not supported by the evidence. See notes 5-6, infra (citing cases that reject bank larceny instruction as unsupported by the evidence).

b. In any event, the court of appeals properly rejected petitioner's contention that bank larceny is a "necessarily included" offense of bank robbery within the meaning of Fed. R. Crim. P. 31(c). In Schmuck v. United States, 489 U.S. 705 (1989), this Court held that the test for determining whether one offense is a "necessarily included" or "lesser included" offense of another is the statutory "elements" test. Under that test:

> [O]ne offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).

489 U.S. at 716.

Under the "elements" test, bank larceny is not a lesser included offense of bank robbery because bank larceny has a statutory element that bank robbery does not. 18 U.S.C. 2113(a) declares that, "[w]hoever, by force and violence, or by intimidation, takes, or attempts to take * * * any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association" is guilty of bank robbery. In contrast, 18 U.S.C. 2113(b) declares that anyone who "takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or in such savings and loan association" is guilty of bank larceny.

Thus, unlike bank robbery, bank larceny has an express "intent to steal or purloin" element.[3] As the court of appeals explained, an intent to steal or purloin means an intent "permanently to deprive the rightful owner of the property." Pet. App. 9 (emphasis added); see United States v. Goldblatt, 813 F.2d 619, 625 (3d Cir. 1987). Consequently, one who takes property from a bank with an intent to return it -- and thus who has no intent to "steal or purloin" -- does not commit bank larceny. In contrast, bank robbery lacks the "intent to steal or purloin" element, and thus one who takes bank property by force or intimidation commits bank robbery whether or not there is an intent to retain (or return) the property. Instead, the hallmark of bank robbery is the use of force or intimidation to acquire the property, and the fact that a robber may not intend to keep the property, or may subjectively intend to return the property, is irrelevant. Pet. App. 9; United States v. Brown, 547 F.2d 36, 39 (3d Cir. 1976) (same), cert. denied, 431 U.S. 905 (1977); United States v. Lewis, 628 F.2d 1276, 1279 (10th Cir. 1980) (same), cert. denied, 450 U.S. 924 (1981);

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[3] That is not the only additional element. The bank larceny statute requires the defendant to "take[] and carr[y] away" the property, while bank robbery requires only that the defendant take the property or attempt to take it; thus, actual possession of the property and carrying it away are not elements of bank robbery, whereas they are elements of bank larceny. In addition, the bank larceny statute requires that the property be worth more than $1,000, while the bank robbery statute does not.

United States v. DeLeo, 422 F.2d 487, 491 (1st Cir.) (same), cert. denied, 397 U.S. 1037 (1970).[4]

Because the offense of bank larceny contains an element that is not required for proof of bank robbery -- an intent to steal or purloin -- it is both definitionally and legally not a "necessarily included" or "lesser included" offense of bank robbery. Pet. App. 9-10. Accord United States v. Gregory, 891 F.2d 732, 734 (9th Cir. 1989) ("Bank larceny * * * contains a specific intent element which need not be proved in the bank robbery context * * *. We thus hold that bank larceny cannot be 'necessarily included' in bank robbery."). See also Schmuck, 489 U.S. at 716-717 (Rule 31(c) requirement that lesser offense be "necessarily included" in the greater one requires that proof of the elements of the greater offense necessarily prove all the elements of the lesser offense).

c. Although the court below expressed the view that circuit law on this question is not necessarily uniform, the decision below is consistent with post-Schmuck holdings. See, e.g., United States v. Gregory, 891 F.2d 732, 734 (9th Cir. 1989). Indeed, those courts of appeals that have suggested that bank larceny is a lesser

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[4] The clearest guide to the elements of the offenses, of course, is the language of the statutes. Because the bank robbery provision does not expressly require an intent to steal or purloin, this Court ordinarily will not read such an element into the offense. See Bates v. United States, 118 S. Ct. 285 (1997) (specific intent to injure or defraud is not an element of the offense of misapplication of funds); United States v. Wells, 117 S. Ct. 921 (1997) (materiality is not an element of false statement to a federal bank offense). This is especially so where, as here, Congress expressly includes an element in one part of a statute but excludes it from another. Russello v. United States, 464 U.S. 16, 23 (1983).

included offense of bank robbery have done so primarily in dictum or in cases decided before Schmuck.

For example, the Fifth Circuit, United States v. Flint, 534 F.2d 58, 60 (5th Cir.), cert. denied, 429 U.S. 924 (1976), and the Eighth Circuit, United States v. Cady, 495 F.2d 742, 747-748 (8th Cir. 1974), have both suggested that bank larceny is a lesser included offense of bank robbery. Those decisions, however, were reached before this Court explained the proper mode of analysis in Schmuck. Before Schmuck, many circuits did not determine whether an offense was "necessarily included" by looking at the elements, but rather by looking at the "relationship" between the interests that the offenses sought to protect. 489 U.S. at 715-716. As a result, pre-Schmuck cases cannot be considered authoritative and are subject to reconsideration in light of Schmuck. See, e.g., Gregory, 891 F.2d at 734 & n.1 (rejecting pre-Schmuck circuit precedent because the circuit's "inherent relationship' test * * * [was] rejected by the Supreme Court * * * in favor of the 'elements' test").

The more recent decisions cited by the court of appeals -- including those from the First Circuit, United States v. Henson, 945 F.2d 430, 440-441 (1st Cir. 1991), the Fourth Circuit, United States v. Walker, 75 F.3d 178, 180-181 (4th Cir.), cert. denied, 116 S. Ct. 2513 (1996); and the Eleventh Circuit, United States v. Cornillie, 92 F.3d 1108, 1109 (11th Cir. 1996) -- do not analyze whether bank larceny is a lesser included offense of bank robbery under Schmuck. Instead, they merely assume (or state) that it is,

and go on to reject the defendant's claim of error on other grounds.[5] Because those cases do not actually analyze whether bank larceny is a lesser included offense of bank robbery under Schmuck, and because their results in no way turned on the answer to that question, their references to bank larceny as a lesser included offense are mere dicta.[6]

Finally, the Tenth Circuit's decision in United States v. Brittain, 41 F.3d 1409 (10th Cir. 1994), is so badly fragmented -- there is no majority opinion -- that it is difficult to tell whether it will have any vitality inside the Tenth Circuit, or be followed outside of it. In that case, two members of the panel agreed with the Third and Ninth Circuits that, under Schmuck, bank larceny is not a lesser included offense of bank robbery. Pet. App. 10 n.3; see Brittain, 41 F.3d at 1412-1415 (opinion of Brown, D.J.); Brittain, 41 F.3d at 1416-1417 (Baldock, J., dissenting). But the panel vacated the conviction for failure to give a larceny instruction nonetheless because the district court judge who wrote the lead opinion felt compelled to follow pre-Schmuck circuit precedent despite his belief that it was wrong. 41 F.3d at 1412-1416 (opinion of Brown, D.J). Given that Brittain has no majority opinion -- and inasmuch as a majority of the judges on the Brittain panel expressed views consistent with the decision below -- it would be premature to conclude that Tenth Circuit law irreconcilably conflicts with the Third Circuit's decision in this case.

Thus, the only circuits that have squarely decided whether bank larceny is a lesser included offense of bank robbery under Schmuck, the Third Circuit below and the Ninth Circuit in Gregory, agree that it is not. The contrary dictum in pre-Schmuck decisions and the fragmented decision of the Tenth Circuit in Britain do not evidence a genuine circuit conflict on this question or otherwise make it worthy of review at this time. Instead, further development in the court of appeals on this issue, in light of Schmuck, is warranted.

2. Petitioner also contends (Pet. 11-16) that the district court abused its discretion by admitting evidence of his prior bank robbery. That fact-bound issue merits no further review.

At trial, the district court admitted a prior state conviction record showing that in 1991 petitioner used intimidation to rob the

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[5] Thus, Henson, 945 F.2d at 440-441, assumed that bank larceny was a lesser included offense, but upheld the conviction because the issue had not been preserved. Cornillie, 92 F.3d at 1109-1110, similarly assumed that bank larceny was a lesser included offense, but held that the instruction was not warranted because the evidence would not support it. In Walker, the court considered the question "undisputed," 75 F.3d at 180 (citing pre-Schmuck precedent), but (as in Cornillie) held that the evidence at trial could not support a larceny instruction, ibid. In addition, in United States v. Sandles, 80 F.3d 1145, 1147 n.1 (7th Cir. 1996), the Seventh Circuit referred to bank larceny as a "lesser included crime" in passing but -- as in the other cases -- did not rely on that passing remark in resolving the matter before it. To the contrary, Sandles was a sentencing appeal and the result in no way hinged on whether bank larceny was a lesser included offense of bank robbery.

[6] The Sixth Circuit has left the issue open. See United States v. Perry, 991 F.2d 304, 310-311 (6th Cir. 1993) (declining to address the appellant's contention that bank larceny is a lesser included offense because no rational jury could find that the teller handed money to the defendant voluntarily).

First Fidelity Bank on Madison Avenue to counter petitioner's argument that he did not knowingly or purposefully use intimidation during the instant offenses. The court carefully instructed the jury to consider that conviction on the issue of intimidation and not for any other purpose. C.A. App. 352-353.

Fed. R. Evid. 404(b) provides that evidence of a defendant's other bad acts is not admissible to prove his character to show that he acted in conformity therewith, but that it is admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident. Here, the district court properly admitted the prior conviction because it was relevant and probative to show that petitioner's intent was to steal money from banks by intimidation, and because it undermined any claim that the intimidation was accidental or unintended. Simply put, evidence that petitioner had successfully used intimidation to rob banks in the past undermined his claim that he planned to do so this time merely by being polite and courteous, or that his intimidation of the tellers was unplanned or accidental.

Nor did the admission of the prior conviction violate Fed. R. Evid. 403, which authorizes a court to exclude relevant evidence if its probative value is substantially outweighed by the danger of it causing unfair prejudice. Here, the evidence of the prior robbery conviction was not inflammatory, nor was it likely to provoke an unduly emotional response from the jury. Further, the district court's careful limiting instruction minimized any prejudice to petitioner. See Shannon v. United States, 512 U.S. 573, 585 (1994)

(it is "the almost invariable assumption of the law that jurors follow their instructions"); see, e.g., Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983) (limiting instruction regarding purposes for which evidence of prior convictions may be used); Spencer v. Texas, 385 U.S. 554, 561 (1967) (same).[7]

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[7] Petitioner argues (Pet. 11-16) that the evidence was unduly prejudicial because it reflected not only the prior conviction, but also stated that petitioner had violated probation, listed several aggravating factors, and stated that there were no mitigating factors in his case. Pet. App. 47-49. These claims, however, are reviewable only for plain error because petitioner neither raised appropriate objections before the trial court nor requested redaction of the document evidencing his conviction. Pet. App. 29; Fed. R. Crim. P. 52(b). Even where plain error is detected, moreover, appellate courts will reverse only where "the forfeited error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" Johnson v. United States, 117 S. Ct. 1544, 1550 (1997). Where, as here, the evidence of guilt is overwhelming -- two tellers identified petitioner as the robber and petitioner's own confession was introduced as well -- such an effect cannot be found. Ibid. Besides, it seems evident that there was no error, much less a less plain error affecting substantial rights. Notwithstanding petitioner's reliance (Pet. 16) on Old Chief v. United States, 117 S. Ct. 644 (1997), Old Chief held that Fed. R. Evid. 403 requires exclusion of a judgment of conviction in a prosecution for possession of a firearm by a convicted felon only if the defendant offers to concede a prior conviction and the only purpose of the evidence is to prove the element of prior conviction. Here, petitioner did not concede the prior conviction or the use of intimidation in his prior robbery, and the evidence was properly admitted to show intentional intimidation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1998

(4)

Supreme Court, U.S.
FILED
MAY 28 1998
CLERK

No. 97-7213

In The

Supreme Court of the United States

October Term, 1997

SYLVESTER MOSLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

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Petition For Certiorari Filed December 22, 1997
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SYLVESTER MOSLEY V. UNITED STATES
NO. 97-7213

RELEVANT DOCKET ENTRIES*
Criminal No. 96-12 (D.N.J.)

Date	Proceedings
1/4/96	Indictment filed.
1/17/96	Defendant's arraignment and plea of not guilty.
3/4/96	Trial before the Honorable Alfred J. Lechner, Jr., United States District Judge for the District of New Jersey and a jury.
3/5/96	Trial before the Honorable Alfred J. Lechner, Jr., United States District Judge for the District of New Jersey and a jury. Testimony concludes. Defendant requests that jury be instructed on Bank Larceny Offense. Request denied.
3/5/96	Jury verdict of guilty.
12/9/96	Judgment entered.
12/13/96	Defendant's Notice of Appeal filed.
1/23/97	Amended Judgment entered.

*Text of entries edited for clarity.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	Criminal No.
v.	(96-12 AJL)
SYLVESTER MOSLEY	Hon.
	18 U.S.C. §§ 2113(a) & 2

INDICTMENT

(Filed Jan. 4, 1995)

The Grand Jury, in and for the District of New Jersey, sitting in Newark, charges:

COUNT 1

On or about November 20, 1995, at Paterson, is Passaic County, in the District of New Jersey, and elsewhere, the defendant,

SYLVESTER MOSLEY,

did knowingly and willfully, by force and violence and by intimidation, take from a teller approximately $9,334.81 belonging to and in the care, custody, control, management, and possession of the First Fidelity Bank, 233 Fifth Avenue, Paterson, New Jersey, whose deposits were then insured by the Federal Deposit Insurance Corporation.

In violation of Title 18, United States Code, Sections 2113(a) and 2.

COUNT 2

On or about November 9, 1995, at Paterson, in Passaic County, in the District of New Jersey, and elsewhere, the defendant,

SYLVESTER MOSLEY,

did knowingly and willfully, by force and violence and by intimidation, take from a teller approximately $2,547.30 belonging to and in the care, custody, control, management, and possession of the First Fidelity Bank, 1008 Madison Avenue, Paterson, New Jersey, whose deposits were then insured by the Federal Deposit Insurance Corporation.

In violation of Title 18, United States Code, Sections 2113(a) and 2.

A TRUE BILL

_____

FOREPERSON

/s/ Faith S. Hochberg
FAITH S. HOCHBERG
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	CRIMINAL NO. 96-12-01
v.	HONORABLE ALFRED J. LECHNER, JR.
SYLVESTER MOSLEY	

DEFENDANT'S REQUESTS TO CHARGE

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BANK LARCENY

Mr. Mosley's defense in this case is that his conduct constituted the crime of Bank Larceny in violation of 18 United States Code Section 2113(b) rather than Bank Robbery in violation of United States Code Section 2113(a).[1]

[1] "Every criminal defendant is entitled to have his theory of the case, if it could amount to a legally sufficient defense based upon the evidence presented at trial, fairly submitted to the jury." *United States v. Burke*, 700 F.2d 70, 81 (2d Cir. 1983); See also *United States v. Blair*, 456 F.2d 514, 520 (3d Cir. 1972). (A trial court is "bound to give the substance of a requested instruction relating to any defense theory for which there [is] any foundation in the evidence.")

I have already charged you as to the four essential elements that the government must proved beyond a reasonable doubt to establish the crime of Bank Robbery. To establish the crime of Bank Larceny, there are also four essential elements that must be proved beyond a reasonable doubt.

The elements of Bank Larceny are:

For Count 1:

First: That the defendant took money that was in the care, possession, control and custody of the First Fidelity Bank, 233 Fifth Avenue, Paterson, New Jersey; and

Second: That the defendant took the money for his own use and benefit knowing that it did not belong to him; and

Third: The money was worth more than $100; and

Fourth: The First Fidelity Bank, 233 Fifth Avenue, Paterson, New Jersey is insured by the Federal Deposit Insurance Corporation, a member of the Federal Reserve System.

If you find that the government proved each of these elements beyond a reasonable doubt, then you must find the defendant guilty of Bank Larceny as to Count One.

For Count 2:

First: That the defendant took money that was in the care, possession, control and custody of the First Fidelity Bank, 1008 Madison Avenue, Paterson, New Jersey; and

Second: That took the money for his own use and benefit, knowing that it did not belong to him; and

Third: The money was worth more than $100; and

Fourth: The First Fidelity Bank, 1008 Madison Avenue, Paterson, New Jersey was insured by the Federal Deposit Insurance Corporation, a member of the Federal Reserve System.

If you find that the government proved each of these elements beyond a reasonable doubt, then you must find the defendant guilty of Bank Larceny as to Count Two.[2]

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[2] Potuto, Saltzburg & Perlman, *Federal Criminal Jury Instructions*, Second Edition (1993 Supplement)

UNITED STATES v. SYLVESTER MOSLEY, U.S. District Court, D.N.J., Criminal No. 96-12

[265] MR. McCAULEY: We have no objection to all the other charges requested by the Government.

THE COURT: Okay.

MR. McCAULEY: In its submission that we also reviewed last Thursday.

I had one request and that is the lesser included offense. Essentially, Mr. Mosley's defense in this case is that he conceded, acknowledged his identity being the person that went into those banks and as the person who took the money from the banks and we did not challenge whether those banks were F.D.I.C. insured by the Federal Reserve System. Those were the remaining elements that the federal charge of bank robbery.

His defense was that his conduct in this case did not satisfy the elements of bank robbery in violation of 18 U.S. Code Section 2113(a), but rather the following section, Section 2113(b), which is the bank larceny charge.

I've submitted a request to charge regarding the bank larceny. The Government did not object to the proposed charge in terms of my proposal and the language. They object to whether it's given or not, but if your Honor chooses to give it, they have no objection –

THE COURT: I understand the language is not in controversy but the charge certainly is.

MR. McCAULEY: All right.

[266] Then the – I submit and I had as a footnote to the request to charge, that every defendant is entitled to

have his theory of the case, if it could amount to a legally sufficient defense, based upon the evidence presented at trial, fairly submitted to the jury.

And I cited *United States v. Byrd* for that case and also *United States v. Blair*, a Third Circuit case, which stated, "A trial court is bound to give the substance of the requested instruction relating to any defense theory for which there is any foundation in the evidence."

So the issue is whether there's been a foundation in the evidence.

THE COURT: Tell me what that is.

MR. McCAULEY: It's the testimony of Special Agent Conway as to whether or not there was a foundation –

THE COURT: What was the testimony that establishes a basis for a lesser included charge of bank larceny?

MR. McCAULEY: The evidence is up to the jury –

THE COURT: No, you tell me what the evidence is first. It's up to the jury whether to accept it, but I want to know the factual basis that you established in this case to justify this charge.

MR. McCAULEY: The evidence given by Special Agent Conway.

It's the evidence of Miss Neufville in conjunction with [267] the testimony of Special Agent Zimmer. The jury has heard that Agent Zimmer testified that Miss Neufville gave inconsistent at the time of the event as to what her testimony is.

Now, the jury will be charged as to evaluating credibility. They may find that the statements given initially, as come out through the testimony of Agent Zimmer is more credible than the testimony that Miss Neufville gave and that would support a taking rather than the force, violence and intimidation.

THE COURT: May I interrupt you?

MR. McCAULEY: Yes.

THE COURT: I need the facts of what you're talking about. I don't recall any facts to establish a basis for this defense in the case, none at all. I'd like you to address what those facts are.

MR. McCAULEY: The facts regarding testimony of Agent Zimmer.

THE COURT: May I continue?

There is nothing to suggest that Mr. Mosley took this money from the bank, as if he reached over the counter and grabbed it from behind the counter and ran out, saw it sitting on a desk. There is nothing to suggest that at all.

There is only evidence to suggest that this money was pushed at him as a result of a threat and intimidation. There is nothing to suggest that he, by himself, without the force or [268] intimidating compliance from the bank officers, obtained this money. That's the problem I have and that's what I want you to address where the facts are to justify this.

If you merely say the evidence from Zimmer and the evidence from Conway established that, you're not helping me to decide your argument because you're being too

vague. I need to know what you say the facts are to demonstrate the absence of force and violence or intimidation and the existence of conduct solely on his part to obtain this money.

This money certainly was not given to him because he was entitled to it and the money was certainly not given to him based upon the voluntary conduct of either of these tellers. There's been no suggestion as to that.

So that's the problem I have.

MR. McCAULEY: With respect, all due respect, your Honor –

THE COURT: I know you don't mean with all due respect, so let's do away with that and get to the argument.

MR. McCAULEY: I do mean it.

With all due respect, the specific testimony of Agent Zimmer is that Miss Neufeld locked the drawer after giving him the money and walked away. Miss Neufeld testified she ran away, so the jury may discredit Miss Neufeld's testimony, accept Agent Zimmer's testimony. That would show that she was calm when she walked away.

[269] THE COURT: She was compliant in giving him this? Please don't roll your eyes or get upset. I'm asking you to give me facts. If you want me to sit here and just listen benignly to what you have to say, you haven't given me one fact yet.

I have a question – frankly, I'll withdraw the question, you go on and shoot in the dark. Go ahead, I don't

want to upset you, Mr. McCauley. Just shoot in the dark and just talk and I'll rule.

Go ahead.

MR. McCAULEY: I'm not upset.

THE COURT: I was going to ask you a question but I withdraw it. Go ahead.

MR. McCAULEY: Your Honor, I'm not upset.

THE COURT: No, please, go ahead.

MR. McCAULEY: I accept whatever –

THE COURT: What else would you like to say, Mr. McCauley?

MR. McCAULEY: That the defendant has a Sixth Amendment right to a trial with a jury, he has a right to present his defense, to present a defense right from the beginning.

Stated in the openings, we acknowledge we were there, we acknowledge we took the money and we said we did not do it by force, violence and intimidation. I believe there is evidence in the record to support where a jury could, in its decision [270] and its conclusion, that there was insufficient evidence for each of those elements.

I pointed to Agent Zimmer's testimony because they may discredit Miss Neufville all together if they find that there was some inconsistencies in her testimony, that they could then reject all of her testimony. So we would be left then with Mr. Mosley going in.

With respect to the 404(b), he pled guilty to the prior robbery. He understood that. He didn't go to trial on that. He did not contest the evidence.

Here, he did and he did cooperate. We have the testimony of Agent Conway where he was totally cooperative. He did not flee. He was quickly taken into custody, went back to the office and he answered all questions posed to him by Agent Conway.

There was nothing there, I submit, to the jury that they could conclude, that there was nothing there regarding threats of force or force or violence or intimidation.

Agent Conway testified that he used the term "hold up," but he never asked him to clarify that, whereas when he said we did the hold up, he did ask him to clarify the "we."

So the term "rob" does – it does have legal significance. I don't believe when you say just because people use the term in this trial robbery, whether it was a prosecutor or any witness, that that answers the question. That is a term [271] of legal significance requiring proof of essential elements.

We have the testimony of Miss Maccaratto, the teller adjacent. There was nobody in between her, regarding count two, and Monica Brown. She did not hear anything. She did not see anything.

The basis of that, the jury may conclude that Miss Monica Brown was overstating what was here and they may reject her testimony and that would always be the jury's decision as to credibility and that's why the jury should have the option of finding a violation of 18 U.S.C.

2113(b). Because if they're rejecting the credibility of these witnesses, they'll be left with nothing as to what happened here, which we acknowledge was wrong. And the crime we acknowledge, we just maintain it's not the crime charged of bank robbery.

We also have the testimony of Officer Medwick. He described Miss Monica Brown as being calm. He interviewed her right after the incident. The jury can accept his testimony and reject Miss Monica Brown's testimony that there wasn't any fear or intimidation.

So on the basis that we've produced testimony, that if accepted by the jury, would not amount to the elements of force, violence or intimidation, that we submit we're entitled to the lesser included offense of bank larceny.

We also have the testimony of Reverend McDowell. He's present with respect to count one. He's right behind – with [272] respect to count two. He's right behind Mr. Mosley. He doesn't see anything, he doesn't hear anything.

He sees Mr. Mosley calmly walk out of the bank. He also testified that he would characterize Miss Neufville's leaving of her station as a walking. So again, if they accept his testimony and reject Miss Neufeld's testimony, on the basis of that, they could find bank larceny or not find the requisite elements of bank robbery.

Thank you.

THE COURT: Anything further?

MR. McCAULEY: No.

THE COURT: I'll hear from the Government.

MR. KLINGEMAN: Briefly, your Honor. We have submitted a letter brief on this issue. I would incorporate that by reference.

I would also incorporate by the reference the arguments we made in opposition to the Rule 29 motion. There is simply no evidence in this record to support a bank larceny conviction and not a bank robbery conviction.

We ask your Honor to deny – not to give the bank larceny charge.

THE COURT: Anything further?

MR. McCAULEY: Yes, your Honor.

I have one additional request and it just came to mind in terms of making this. It's the false in one and false in [273] all.

THE COURT: Before we get to that, anything further with regard to this?

MR. McCAULEY: No.

THE COURT: All right.

I am not going to give the bank larceny charge. I gave defense counsel an opportunity to demonstrate to me what facts there were in the evidence to justify bank larceny charge. There simply are no facts in evidence to justify a bank larceny charge.

There is nothing to suggest that anything occurred in this case, other than what the Government has submitted for the charge, if the jury accepts the facts in this case. If

they reject it, then an acquittal. Obviously that will be in order in the case.

Clearly, there is no basis to suggest that this money was taken with the compliance of these tellers. There is nothing to suggest that the money was merely sitting on the counter and he grabbed it and ran out of the bank.

The evidence is clear that the money was in the cash drawers. As a result of his approach to each of the tellers, they were forced, through intimidation, to retrieve the money from the cash drawers and push it at him. There is nothing to suggest that this was a larceny as that term is used in 2113(a).

[274] The elements that the Government has to prove have been established by a prima facie evidence. Whether the jury accepts them or not is a different issue, but as a basis for a lesser included charge of bank larceny, it simply does not exist.

There is no other way this money could have been obtained. The jury may reject all the Government's arguments and return an acquittal, that's a different issue. There is certainly nothing to suggest that the charge, as requested by the defense, should be given in the case.

The application is denied.

You had another request?

MR. McCAULEY: Yes, your Honor.

The credibility of witnesses, the Government's request number eight, that you also include language that is the standard language as, I submit, false in one, false in all.

THE COURT: I'm going to tell the jury, as I did in the opening, they can accept everything a witness tells, reject everything a witness tells or accept a portion and reject a portion.

Anything else?

MR. McCAULEY: I would just ask a little more specificity regarding if they find that the witness has been falsely testifying in one respect, you may reject the total testimony.

---

[328] and November 20, 1995. It's the position of the United States that this conviction, as well as other pieces of evidence, demonstrate Mr. Mosley's intent to intimidate the bank tellers at the time of the crimes charges.

Now, it's proper to use this evidence to decide whether or not Mr. Mosley intended to intimidate the bank tellers. Should you chose [sic] to believe the evidence presented about the defendant's prior conviction for bank robbery, I caution you, you may use it only – you may use and consider this evidence only for the limited purpose I just described.

You may not use it to conclude the defendant is a bad person or that he was predisposed to do bad things. Therefore, you should only consider this evidence for the purpose with which I just discussed with you and in conjunction with these instructions. I stress, to consider the evidence for any other purpose would be improper.

Now, in this case, the federal Grand Jury returned a two-count indictment as you know. Count one charges that the defendant knowingly and willfully, by force and violence and by intimidation, took from the teller – took from a teller approximately $9,334 belonging to and in the custody, control, care, management and possession of First Fidelity Bank, 233 Fifth Avenue, Paterson, New Jersey. That these deposits were insured by the F.D.I.C.

Count two charges the same thing, that it was taken [329] knowingly and willfully, by force, violence and intimidation, that is the amount of $2,547 from a teller and that that money belonged to or was in the care,

custody, control, management or possession of First Fidelity Bank at 1008 Madison Avenue, Paterson. Again, it alleges that those deposits were insured by the F.D.I.C.

You're going to have a copy of that indictment with you in the jury room. I talked to you about that indictment twice now as to the purpose of the indictment.

Both of these counts charge that the defendant violated Title 18 of the United State Code, Section 2113(a). I'll read that to you in pertinent part.

It reads, "Whoever, by force and violence or by intimidation takes or attempts to take from the person or presence of another any money belonging to or in the care, custody, control, management or possession of any federally insured bank shall be guilty of a crime against the United States."

Now, there are four essential elements that must be proved by the Government beyond a reasonable doubt with regard to each count of the indictment. For count one, Government must prove: First, that Mr. Mosley took money from or in the possession of employees of the First Fidelity Bank at 233 Fifth Avenue, Paterson; second, that the money was in the care, custody, control, management or possession of First Fidelity [330] Bank, 233 Fifth Avenue, Paterson, at the time it was taken; third, that Mr. Mosley took the money by means of force, violence or intimidation; fourth, that at the time the money was taken from First Fidelity Bank at 233 Fifth Avenue, Paterson, the deposits of the bank were insured by the Federal Deposit Insurance Corporation.

Count two has exactly the same elements with the exception that the bank branch is at 1008 Madison Avenue. So the same four counts apply, but there is a different branch that is involved, same four elements apply in the second count.

Let me talk to you about the term "by force and violence or by intimidation." Let me define it for you.

That means either, one, the use of actual physical strength or actual physical violence or two, doing some act or making some statement to put someone in fear of bodily harm.

The requirement of taking by force and violence or by intimidation under Section 2113(a) is disjunctive. The Government need only prove force and violence or intimidation to establish its case. It does not have to prove both.

The Government contends in this case that the taking of money was by intimidation. If you so find beyond a reasonable doubt that the money was taken by intimidation, this element of the offense is satisfied.

Now, the word "intimidation" must be caused by an act knowingly and deliberately done and a statement knowingly and [331] deliberately made, willfully made by the defendant or made in such manner or under the circumstances that would produce such a reaction or such a fear of bodily harm in a reasonable person.

The United States does not have to prove that the behavior of Mr. Mosley was so violent that it was likely to cause terror, panic, hysteria. Further, the United States

does not have to prove that the alleged victim was actually frightened.

A taking would not be by means of intimidation, however, if fear on the part of the alleged victim resulted from that person's own timidity rather than from some intimidating conduct on the part of Mr. Mosley. The essence of the offense is the taking of money or property, aided and accompanied by an intentional intimidating behavior on the part of the defendant.

The phrase "care, custody, control, management or possession" means money or funds that were physically within the bank or within its power to control. When a bank holds money that has been deposited by its customers, for example, that bank has care, custody, control, management or possession of that money.

Now, counts one and two of the indictment also refer to Section 2 of Title 18 of the United States Code. Under that statute, the guilt of a defendant may be established without proof that he was the one who actually performed the acts [332] constituting the substantive crimes. That section provides in relevant part, as follows: "Whoever commits an offense against the United States or aids, abets, councils, commands, induces or procures its commission is punishable as a principle.

"Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principle."

Now, in other words, every person who willfully causes the commission of a crime or participates in it may

be found guilty of that offense. Causing or participating in a crime is willful if done voluntarily and intentionally, with a specific intent to do something the law forbids or to fail to do something the law requires to be done. That is to say with bad purpose, either to disobey or disregard the law.

Now, you must find that the Government, the United States has proved that the defendant knowingly and intentionally violated the law. A person acts knowingly if he acts voluntarily and intentionally and not because of some mistake or accident or other innocent reason.

The purpose of adding the word "knowingly" is to insure that no one will be convicted of an act done because of a mistake or accident or other innocent reason. A person acts willfully or intentionally if he acts voluntarily and with the specific intent or purpose to do something the law forbids or with specific intent to omit something the law requires him to [333] do. In other words, with a bad purpose or evil intent to either disobey or disregard the law.

In determining whether the defendant has acted knowingly and willfully, it is not necessary for the United States to establish that he knew he was breaking any particular law. Ignorance of the law is no excuse, it is no defense in this case.

Now, knowledge may be proved by the defendant's conduct and all the facts and circumstances surrounding the case. Knowledge and intent exist in the mind. It's not possible to open somebody's head and look into somebody's mind. The only way you have to decide these questions is for you to consider all of the facts and

circumstances shown by the evidence and determine from such facts and circumstances whether the requisite knowledge was present at the time in question.

Again, what are we talking about? Circumstantial evidence. Direct proof is not necessary.

I point out to you that many crimes are seldom susceptible to direct proof. Here we have direct proof in many instances of what went on in the case should you accept that proof. In many instances, proof is circumstantial.

I'm suggesting that you need to consider all of the evidence in the case. You may consider a defendant's words or actions, as well as other facts and circumstances in evidence and the reasonable inferences from that evidence to determine [334] the defendant's state of mind and knowledge.

Now, you will note that the indictment charges that the offense took place on or about a certain date. The law requires only a substantial similarity between the dates as charged in the indictment and the dates mentioned during the testimony. The proof does not need to show with certainty the exact date on which the act occurred, just as long as you find the act or offense occurred on or reasonably near the dates specified in the indictment.

Upon reading the indictment, you may notice the word "and" is used, a-n-d, is used between other charge words. I specifically instruct you that it is sufficient to prove that the defendant did one of the acts charged. In other words, you should treat the conjunctive "and" a-n-d, as being the disjunctive "or," o-r.

Now, all of the evidence, whether I've mentioned it or whether counsel has referred to it, must be considered by you. It makes no difference whether the evidence was offered by the United States or by the defendant. It is all evidence and you are to consider it to the extent that it helps you decide the issues in the case.

Now, you are to determine the facts based upon the evidence as presented to you during the course of the trial. I've described to you the various concepts with which you're going to have to deal in deciding this matter.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

(Filed Dec. 9, 1996)

UNITED STATES OF AMERICA

vs.

SYLVESTER MOSLEY

(Defendant's Name)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
96-00012-01

Donald McCauley, Esq.
Attorney's Name

THE DEFENDANT:

_ pleaded guilty to count(s) _____
X was found guilty on count(s) 1 and 2
after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s) which involve the following offenses:

TITLE SECTION	NATURE OF OFFENSE	DATE OF OFFENSE	COUNTS
18:2113(a)	Bank Robbery	11/20/95	1
18:2113(a)	Bank Robbery	11/09/95	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_ The defendant has been found not guilty on counts _____ and is discharged as to such count(s).

_ Count(s) _____ (is)(are) dismissed on the motion of the United States.

X It is ordered that the defendant shall pay a special assessment of $100.00, for count(s) 1 and 2, which shall be due X immediately _ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
147-40-6342 or 147-40-6324; 147-12-6342; 147-40-6345

Defendant's Date of Birth:
11/18/48 or 11/28/48

December 9, 1996
Date of Imposition of Sentence

Defendant's Address:
Union County Jail
15 Elizabeth Plaza
Elizabeth, NJ 07202

/s/ Alfred J. Lechner
Signature of Judicial Officer

Hon. Alfred J. Lechner, Jr., U.S.D.J.
Name & Title of Judicial Officer

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 210 months on each of Counts 1 and 2 to run concurrently.

_ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.

_ The defendant shall surrender to the United States Marshal for this district.

_ at ___ a.m. on _____.
_ as notified by the United States Marshal.

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

_ before a.m./p.m. on _____.
_ as notified by the United States Marshal.
_ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

___ Defendant delivered on _____ to _____

_____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years on each of Counts 1 and 2 to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant must submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer. If this judgment imposes a restitution obligation, it shall be a conditions [sic] of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

1. The defendant shall refrain from the illegal possession and/or use of drugs and shall submit to urinalysis or other forms of testing to assure compliance. It is further ordered that the defendant shall submit to drug treatment on an outpatient or inpatient basis, if directed by the U.S. Probation Office. The defendant shall abide by the rules of the program and shall remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

OR

_ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 32

Criminal History Category: VI

Imprisonment Range: 210 to 262 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 17,500.00 to $ 175,000.00

X Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: $ 0

X Full restitution is not ordered for the following reason(s):

Inability to pay full restitution.

X The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

_ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range.

_ upon motion of the government, as a result of defendant's substantial assistance.

_ for the following reason(s):

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

(Filed Jan. 23, 1996)

UNITED STATES OF AMERICA

vs.

SYLVESTER MOSLEY

(Defendant's Name)

AMENDED

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: 96-00012-01

Donald McCauley, Esq.
Attorney's Name

THE DEFENDANT:

_ pleaded guilty to count(s) _____

X was found guilty on count(s) 1 and 2 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s) which involve the following offenses:

TITLE SECTION	NATURE OF OFFENSE	DATE OF OFFENSE	COUNTS
18:2113(a)	Bank Robbery	11/20/95	1
18:2113(a)	Bank Robbery	11/09/95	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s)

_ Count(s) _____ (is)(are) dismissed on the motion of the United States.

X It is ordered that the defendant shall pay a special assessment of $100.00 , for count(s) 1 and 2, which shall be due X immediately _ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
147-40-6342 or 147-40-6324; 147-12-6342; 147-40-6345

Defendant's Date of Birth:
11/18/48 or 11/28/48

December 9, 1996
Date of Imposition of Sentence

Defendant's Address:
Union County Jail
15 Elizabeth Plaza
Elizabeth, NJ 07202

/s/ Illegible
Signature of Judicial Officer

Hon. Alfred J. Lechner, Jr., U.S.D.J.
Name & Title of Judicial Officer

Date: January 23, 1997

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 210 months on each of Counts 1 and 2 to run concurrently .

_ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.

_ The defendant shall surrender to the United States Marshal for this district.

_ at ____ a.m. on _____.
_ as notified by the United States Marshal.

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
_ before a.m./p.m. on _____.
_ as notified by the United States Marshal.
_ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

____ Defendant delivered on _____ to _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years on each of Counts 1 and 2 to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant must submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer. If this judgment imposes a restitution obligation, it shall be a conditions [sic] of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

1. The defendant shall refrain from the illegal possession and/or use of drugs and shall submit to urinalysis or other forms of testing to assure compliance. It is further ordered that the defendant shall submit to drug treatment on an outpatient or inpatient basis, if directed by the U.S. Probation Office. The defendant shall abide by the rules of the program and shall remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment the defendant shall not commit another federal, state or local crime. In addition:

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

OR

_ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 32

Criminal History Category: VI

Imprisonment Range: 210 to 262 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 17,500.00 to $ 175,000.00

X Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: $ 0

X Full restitution is not ordered for the following reason(s):

Inability to pay full restitution.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

X **The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):**

The defendant's criminal conduct, combined with an extraordinary extensive criminal history, justifies this sentence, and as explained at sentencing.

OR

The sentence departs from the guideline range.

_ upon motion of the government, as a result of defendant's substantial assistance.

_ for the following reason(s):

UNITED STATES of America,

v.

Sylvester MOSLEY, Appellant.

No. 96-5832.

United States Court of Appeals,
Third Circuit.
Argued Aug. 11, 1997.

Decided Sept. 18, 1997.

Faith S. Hochberg, United States Attorney, Kevin McNulty, Elizabeth S. Ferguson, Mark Costello, (argued), Office of the United States Attorney, Newark, NJ, for Appellee.

Donald J. McCauley, (argued), Office of Federal Public Defender, Newark, NJ, for Appellant.

BEFORE STAPLETON, GREENBERG, and COWEN, Circuit Judges.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

Appellant Sylvester Mosley appeals from a judgment of conviction and sentence entered in the district court on two counts of bank robbery. Mosley argues that the district court erred in failing to instruct the jury that it could convict him of bank larceny as a lesser included offense

of bank robbery.[1] This case raises an issue we have not addressed: whether bank larceny, 18 U.S.C. § 2113(b), is a lesser included offense of bank robbery, 18 U.S.C. § 2113(a). Contrary to the weight of authority, we find that bank larceny is not a lesser included offense of bank robbery. Thus, we will affirm.

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction to review the judgment of the district court pursuant to 28 U.S.C. § 1291. We exercise plenary review over the legal question raised on this appeal. *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir.1985).

II. FACTUAL AND PROCEDURAL HISTORY

Count one of the indictment charged Mosley with knowingly and willfully, by force and violence or intimidation, taking approximately $9,344.81 from a teller at the First Fidelity Bank at 233 Fifth Avenue in Paterson, New Jersey, in violation of 18 U.S.C. § 2113(a) and 18 U.S.C. § 2. Count two charged him with knowingly and willfully, by force and violence or intimidation, taking approximately $2,547 from a teller at the First Fidelity Bank at 1008 Madison Avenue in Paterson, New Jersey,

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[1] We also have considered Mosley's claims that the district court abused its discretion in admitting evidence of his prior conviction for bank robbery pursuant to Fed.R.Evid. 404(b) and 403, and that the district court erred in failing to grant him a judgment of acquittal on count two of the indictment pursuant to Fed.R.Crim.P. 29. After careful consideration, we find that neither of these claims justifies reversal so we reject these arguments without further discussion.

also in violation of 18 U.S.C. § 2113(a) and 18 U.S.C. § 2. After a two-day trial, the jury found Mosley guilty on both counts. The district court subsequently sentenced Mosley to concurrent 210-month terms of imprisonment on each count and it imposed concurrent three-year terms of supervised release to follow the custodial terms.

There was no real factual dispute at trial as Mosley conceded in his opening statement to the jury that he entered both banks and took money from them. Rather, his defense was that his conduct did not satisfy the requisite elements of bank robbery in violation of 18 U.S.C. § 2113(a). Nevertheless, we briefly describe the robberies.

1. Count One

A bank teller at First Fidelity Bank on Fifth Avenue testified that she was working at the bank on November 20, 1995, when Mosley approached her window, leaned toward her and said "This is a hold up." He then said "open your bottom drawer and give me all the big bills, start with the big bills first." The teller testified that she was nervous, lost bladder control, and threw the money on the counter. When she asked Mosley if she could go to the bathroom, he replied, "Hurry, hurry, open the drawer and give me the big bills first." She testified that Mosley "gestured to his coat as if he had something there." After throwing the money on the counter, the teller ran to the head teller and stated "I just been held up, I just been held up."

On cross-examination, the teller testified that after giving Mosley the money, she locked the drawer and

started to walk toward the bathroom. When the police interviewed her on the day of the incident, she did not indicate that Mosley had a weapon in his possession.

FBI Special Agent Carolyn Zimmer testified that she interviewed the teller shortly after the robbery and prepared a report regarding the robbery. In that report, Zimmer stated that the teller walked away from her station after the robbery, that Mosley had a "sickly appearance," and that he told the teller that he was "sick."

FBI Special Agent John Conway testified that he arrested Mosley on November 20, 1995, after the robbery charged in count one of the indictment. He stated that Mosley said to him "We robbed the bank, First Fidelity Bank." Conway testified that he never asked Mosley what he meant when he said "rob" and that there was nothing in his report of the robbery regarding threats, force or intimidation. Conway also testified regarding the bank surveillance video tape of the robbery and that it did not reveal evidence of threats, force, intimidation or violence.

Reverend Louis McDowell testified that he was a customer in the bank on November 20, 1995, and was standing directly behind Mosley. McDowell indicated that he did not see Mosley make any motions toward the teller, nor take any actions that he would characterize as indicative of force or violence. He testified that after the robbery Mosley walked past him and out of the bank and that the teller walked away from her station.

2. Count Two

A teller at the First Fidelity Bank, 1008 Madison Avenue, testified that she was working in the bank on November 9, 1995, when a man with a sign reading "HOLD UP" approached her station. She testified that she was scared and nervous and that Mosley placed both of his hands on the counter and asked her for money by saying "Can I have all your money?" The teller testified further that Mosley used a defensive but demanding tone of voice, but said nothing else to her. When she gave Mosley "bait money," he threw it back at her. She then gave Mosley the other money, and Mosley walked away at a fast pace.

On cross-examination, the teller testified that she did not tell either the Paterson police or the FBI agents that she saw Mosley with a weapon, and she told both that Mosley's hands were visible to her throughout the robbery, which lasted approximately five seconds. The teller testified also that Mosley appeared to be homeless, had bags under his eyes, and seemed to be about 60 years old.

Conway testified regarding the surveillance videotape regarding count two of the indictment, as well. He stated that the videotape revealed that Mosley displayed both of his hands on the counter throughout the robbery and that during the three or four seconds of the robbery the videotape did not show Mosley using force, violence or intimidation.

The Paterson police officer who interviewed the teller after the robbery reported that Mosley had not brandished any weapon, and that during the interview, just 16 minutes after the robbery, the teller did not appear to be

upset. The teller working at the station adjacent to the teller approached by Mosley testified that she did not see or hear anything alerting her to the robbery while it was occurring.

III. DISCUSSION

As we have indicated, Mosley acknowledges that he entered the banks and took money as alleged in counts one and two of the indictment. He argues, however, that the court's refusal to charge the jury at his request that it could convict him of bank larceny eliminated his defense that his conduct did not satisfy the required elements of bank robbery.

Mosley argues that he was entitled to a charge that the jury could convict him of bank larceny as a lesser included offense because "every defendant is entitled to have his theory of the case, if it could amount to a legally sufficient defense, based upon the evidence presented at trial, fairly submitted to the jury . . . and that a trial court is bound to give the substance of the requested instruction relating to any defense theory for which there is any foundation in the evidence." Br. at 18. Thus, he relies on the general rule that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63, 108 S.Ct. 883, 887, 99 L.Ed.2d 54 (1988). The government, though recognizing that a defendant is entitled to a charge on a lesser included offense if justified by the evidence, urges that bank larceny is not a lesser included offense of bank robbery. It therefore contends that the

district court correctly rejected Mosley's request to charge bank larceny.

The district court found that

> [t]here simply are no facts in evidence to justify a bank larceny charge. . . . Clearly, there is no basis to suggest that this money was taken with the compliance of these tellers. . . . The evidence is clear that the money was in the cash drawers. As a result of his approach to each of the tellers, they were forced, through intimidation, to retrieve the money from the cash drawers and push it at him. There is nothing to suggest that this was a larceny as that term is used in [section] 2113(a)[sic].

App. at 298.

Our approach in this case is different from that of the district court, as we decide the case predicated on the law rather than on an absence of proof to justify a larceny instruction to the jury. Fed.R.Crim.P. 31(c) permits a jury to return a verdict of guilty as to an offense "necessarily included in the offense charged." However, this rule applies only where the elements of the lesser offense are a subset of the elements of the greater offense. "Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c)." *Schmuck v. United States*, 489 U.S. 705, 716, 109 S.Ct. 1443, 1450, 103 L.Ed.2d 734 (1989). This standard involves a textual comparison, looking solely to the elements of the two offenses; inferences arising from the evidence and similarities as to the interests served by the statutes are not relevant. *Id.* at 720, 109 S.Ct. at 1452-53.

We begin, then, by looking to the text of section 2113 which provides that:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association;. . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or in such savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both. . . .

18 U.S.C. §§ 2113(a) & (b).[2] It is obvious that the definition of bank robbery in subsection (a) does not include an element that the defendant have the "intent to steal or purloin." On the other hand, bank larceny as defined in subsection (b) includes this element. A defendant has the intent to steal or purloin if he intends permanently to deprive the rightful owner of the property. *See United States v. Goldblatt*, 813 F.2d 619, 625 (3d Cir.1987). Thus,

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[2] The presence of a threshhold [sic] "exceeding $1,000" in the quoted paragraph of 18 U.S.C. § 2113(b) does not add an element to the offense of bank larceny not present in bank robbery because the next paragraph of section 2113(b) imposes a less severe sentence in those cases "not exceeding $1,000."

we must determine whether the "steal or purloin" provision is included impliedly as an element of bank robbery in subsection (a). If it is not, bank larceny includes an element not included within bank robbery and thus, under *Schmuck*, is not a lesser included offense of bank robbery.

We have held that the subjective intent of a bank robber to steal is irrelevant; "the crime is his resort to force and violence, or intimidation, in the presence of another person to accomplish his purposes." *United States v. Brown*, 547 F.2d 36, 39 (3d Cir.1976) (citations omitted). Thus, it is "immaterial for section[ ] 2113(a) . . . whether the subjective intent of a bank robber is to steal that to which he has no claim or to recover his own deposit." *Id.* In contrast, however, section 2113(b) specifically requires intent to steal or purloin to satisfy the elements of bank larceny. Given this holding in *Brown*, it seems clear that bank larceny cannot be a lesser included offense of bank robbery under the Supreme Court's strictures in *Schmuck*, which indicates that "offenses are statutorily defined." *Schmuck*, 489 U.S. at 716, 109 S.Ct. at 1451.

Nevertheless, while it seems clear to us that bank larceny is not a lesser included offense of bank robbery, there is a conflict among the courts of appeals on this point and, as we pointed out above, the weight of authority is against our position. In these circumstances, we review the cases from the other courts of appeals. We start with *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir.1989), which reached our result that, under *Schmuck*, bank larceny is not a lesser included offense of bank robbery. *Gregory* reached this result because "[b]ank larceny . . . contains a specific intent element which need not

be proved in the bank robbery context. . . . [Hence] bank larceny cannot be 'necessarily included' in bank robbery." *Id.* at 734. Thus, we are not alone in our holding on this appeal.

We are particularly impressed by the insightful discussion of the issue in *United States v. Brittain*, 41 F.3d 1409 (10th Cir.1994). While ultimately holding that bank larceny is a lesser included offense of bank robbery, the court expressed its hesitance to do so.[3] Accordingly, notwithstanding its actual holding, we find support in the *Brittain* court's extensive analysis supporting a conclusion contrary to its holding. As the *Brittain* court explained, "[f]irst and foremost, the language of § 2113 calls into question [the] conclusion that bank robbery contains all the elements of bank larceny." *Id.* at 1412-13. The *Brittain* court focused specifically on the "intent to steal or purloin" element that is contained in bank larceny but not bank robbery. The decisions that find bank larceny a lesser included offense must infer that intent to

[3] The *Brittain* court so held because it found itself bound by its previous holdings. Yet it clearly indicated that it might not have reached its holding in the absence of binding precedent. In fact, a fair reading of *Brittain* confirms that a majority of the court believed that bank larceny is not a lesser included offense in a bank robbery case. Judge Brown, who wrote the majority opinion, made it clear that he reached the contrary conclusion only because of circuit precedent. Judge Baldock dissented on the ground that *Schmuck* rejected the reasoning in the circuit precedent. In his view, *Gregory* set forth the correct analysis under *Schmuck*. *Brittain*, 43 F.3d at 1417 (dissenting opinion). Only Judge Ebel apparently thought that, even using a *Schmuck* analysis, bank larceny was a lesser included offense of bank robbery. *Id.* at 1416 (concurring opinion).

steal or purloin is also an element of bank robbery. Also, while section 2113(b) requires a showing of taking and carrying away of money or property, section 2113(a) does not include the carrying away language.

The *Brittain* court also discussed the history of section 2113 to illustrate its reluctance to hold that bank larceny is a lesser included offense of bank robbery. The court recognized that there is no indication in the legislative history that Congress intended section 2113(a) to contain an "intent to steal" element identical to section 2113(b). *Id.* at 1413. The court explained that Congress initially passed the bank robbery legislation in 1934, and, though both robbery and larceny provisions were proposed, the larceny provision was deleted from the legislation. Congress added a larceny provision three years later in reaction to a case in which a man walked into a bank and, without confronting any bank employees, helped himself to $11,000. *Id.* at 1413 (citing *Bell v. United States*, 462 U.S. 356, 365 n. 4, 103 S.Ct. 2398, 2403 n. 4, 76 L.Ed.2d 638 (1983) (Stevens, J., dissenting)). Thus, the larceny statute seemed designed to address a different factual scenario than the typical bank robbery case.

We recognize that there is another conceivable reading of the development of the legislation. Inasmuch as both robbery and larceny were offenses at common law, it might be argued that Congress intended to incorporate the intent element of the common law crimes into section 2113.[4] However, there is no indication in the legislative

[4] The *Brittain* court questioned the plausibility of this argument in light of the Supreme Court's statement in *Bell v.*

history that Congress so intended. The *Brittain* court suggested that an "intent to steal" element within the bank robbery provision would have been implied more easily from the bank robbery statute as it originally was written, as that version included an element of "feloniously" taking property. The term felonious could have been understood as including an intent requirement. *Brittain*, 41 F.3d at 1413. However, when Congress revised the criminal code in 1948, it deleted the word "feloniously" from section 2113(a). The Revisor's Notes indicate that this was considered only a "change in phraseology." *Brittain* 41 F.3d at 1414 (citing *Prince v. United States*, 352 U.S. 322, 326 n. 5, 77 S.Ct. 403, 406 n. 5, 1 L.Ed.2d 370 (1957)). And though it seems that the deletion of "feloniously" was a result of Congress' effort to delete references to felonies and misdemeanors from the code, inasmuch as both terms were defined in 18 U.S.C. § 1 (repealed), Congress' failure to give some indication that intent was to remain an element of bank robbery may provide support for the proposition that intent was not conceived as an element of the crime. *See United States v. Richardson*, 687 F.2d 952, 957 (7th Cir.1982).

Thus, the *Brittain* court found that the history of the statute mandated against a finding that bank larceny is a lesser included offense of bank robbery. Accordingly, at most, the revisions to the criminal code provide minimal guidance as to the meaning of section 2113. For this reason, we find even more helpful to our conclusion that

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United States, 462 U.S. at 360, 103 S.Ct. at 2401, that the phrase "with intent to steal or purloin" in subsection 2113(b) "has no established meaning at common law." *Brittain*, 41 F.3d at 1413.

bank larceny is not a lesser included offense of bank robbery, the combination of both the literal words of the statute and the factual history underlying the enactment of the larceny statute.

We recognize that the Courts of Appeals for the First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have held, or at least indicated, that bank larceny is a lesser included offense of bank robbery. *See United States v. Henson*, 945 F.2d 430, 440 (1st Cir.1991) (stating that "failure to instruct on the lesser charge of bank larceny" not plain error); *United States v. Carter*, 540 F.2d 753, 754 (4th Cir.1976) (holding that court must instruct jury on lesser included offense of bank larceny where there is factual dispute as to existence of force and violence or intimidation but affirming because evidence did not require larceny instruction); *United States v. Walker*, 75 F.3d 178 (4th Cir.) (same), *cert. denied*, ___ U.S. ___, 116 S.Ct. 2513, 135 L.Ed.2d 202 (1996); *United States v. Flint*, 534 F.2d 58, 60 (5th Cir.1976) (affirming district court's refusal to give instruction on lesser included offense of bank larceny because there was no factual dispute as to the presence of intimidation or violence but indicating that bank larceny is a lesser included offense in a bank robbery indictment); *United States v. Perry*, 991 F.2d 304, 307 (6th Cir.1993) ("[T]he court declined to instruct the jury on the lesser included offense of bank larceny, 18 U.S.C. § 2113(b)."); *United States v. Cady*, 495 F.2d 742, 747-48 (8th Cir.1974) (recognizing that bank larceny is a lesser included offense of bank robbery under section 2113); *United States v. Brittain*, 41 F.3d 1409; *United States v. Cornillie*, 92 F.3d 1108, 1110 (11th Cir.1996) (acknowledging, without discussion, that bank larceny is a lesser

included offense of bank robbery).[5] In our view, these opinions are not consistent with the methodology of *Schmuck*. Therefore, we reject the majority view that bank larceny is a lesser included offense of bank robbery.

IV. CONCLUSION

In view of the aforesaid, we hold that the district court's refusal to grant Mosley's request for a jury instruction on bank larceny was proper as bank larceny is not a lesser included offense of bank robbery.[6] We

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[5] The Court of Appeals for the Seventh Circuit has conflicting holdings on this issue. In 1969, the court held that "[t]his is not an instance of 'lesser-included offense' which would have entitled defendant to the jury instruction he sought, since the commission of either crime is made unlawful by the same statutory section and one is not 'lesser' than the other." *United States v. Hephner*, 410 F.2d 930, 934 (7th Cir.1969). In contrast, the court held in 1996 (without reversing or even commenting on the earlier holding) that "[a]s an element of the crime of bank robbery, 18 U.S.C. § 2113(a), the government must prove that the accused committed the crime 'by force and violence, or by intimidation.' This element is missing from the lesser included crime of bank larceny under 18 U.S.C. § 2113(b)." *United States v. Sandles*, 80 F.3d 1145, 1147 n. 1 (7th Cir.1996).

[6] We recognize that our result will mean that if a jury concludes that a defendant did not use force and violence or intimidation in a bank robbery case, but nevertheless intended to steal or purloin the property or money, it must acquit the defendant if the indictment is only for bank robbery. We, however, express no view on whether a grand jury may indict a defendant for both bank robbery and bank larceny by reason of a single incident, as that issue is not involved here. Finally, we

accordingly will affirm the conviction and sentence of the district court entered December 11, 1996.

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note that Mosley does not contend that the evidence cannot support the bank robbery conviction on count one.

Supreme Court of the United States

No. 97-7213

Sylvester Mosley,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

March 23, 1998

(5)

Supreme Court, U.S.
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No. 97-7213

In The

Supreme Court of the United States

October Term, 1997

SYLVESTER MOSLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTION PRESENTED

Whether bank larceny in violation of 18 U.S.C. § 2113(b), is a lesser included offense of bank robbery in violation of 18 U.S.C. § 2113(a), as a matter of law, pursuant to the textual "elements" test adopted by the United States Supreme Court in *Schmuck v. United States*, 489 U.S. 705 (1989).

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OPINIONS BELOW

The opinion of the court of appeals is reported at 126 F.3d 200. (J.A. 39). The opinion of the United States District Court for the District of New Jersey denying Mr. Mosley's post-verdict motions for new trial, for acquittal, and for a downward departure from the otherwise applicable federal sentencing guidelines is unreported. (Pet. App. 15-46).[1]

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1997. (Pet.App.2). The court of appeals denied a petition for rehearing en banc on December 15, 1997. (Pet.App.1). Mr. Mosley filed his petition for a writ of certiorari on December 22, 1997. The petition was granted limited to the question now presented in this brief on March 23, 1998. (J.A. 54). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The "Bank robbery and incidental crimes" provisions of Chapter 103 ("Robbery and Burglary") of Title 18 are the central statutory provisions in this case. They are, in relevant part, as follows:

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[1] J.A. refers to the joint appendix filed in this Court. Pet.App. refers to the appendix to the petition for writ of certiorari. C.A. App. refers to the appendix filed in the court of appeals below.

§ 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both[.]

18 U.S.C. § 2113 (1984).

STATEMENT OF THE CASE

Petitioner Sylvester Mosley was charged by indictment in the United States District Court for the District of New Jersey with two counts of bank robbery in violation of 18 U.S.C. § 2113(a). (J.A. 2). Count one charged that on November 20, 1995, petitioner did knowingly and willfully, by force and violence and by intimidation, take from a teller approximately $9,334.81 belonging to the First Fidelity Bank, 233 Fifth Avenue, Paterson, New Jersey. (J.A. 2). Count two similarly charged that on November 9, 1995, petitioner did knowingly and willfully, by

force and violence and by intimidation, take from a teller approximately $2,547.38 belonging to the First Fidelity Bank, 1008 Madison Avenue, Paterson, New Jersey. (J.A. 3). Petitioner was arraigned on January 17, 1996 and pleaded not guilty to both counts to the indictment. (J.A. 1, C.A. App. 6).

Petitioner was tried before the district court and a jury on March 4 and 5, 1996. (C.A. App. 61-373). At trial, petitioner submitted a written request to the district court to charge the jury on the offense of bank larceny, in violation of 18 U.S.C. § 2113(b). (J.A. 4). On the record, petitioner further interposed this request and objected to the district court's proposed charge to the jury. (J.A. 7-8). Petitioner argued that the jury could credit evidence that would support convictions for bank larceny, could discredit evidence that would support convictions for bank robbery, and that bank larceny is a lesser included offense of bank robbery. (J.A. 7-13). Specifically, petitioner argued that the testimony of the individual bank tellers regarding a taking of money by force and violence or intimidation was controverted by: (1) the testimony of Special Agent Conway of the Federal Bureau of Investigation (FBI) that the videotapes of both incidents did not reveal evidence of force, violence or intimidation (J.A. 8, 12, C.A. App. 167-203, 215-228); (2) the testimony of Special Agent Zimmer of the FBI and local police officer Medwick regarding inconsistencies between the testimony of the tellers and their prior statements (J.A. 8-11, 13, C.A. App. 245-254, 260-262); (3) the testimony of Reverend McDowell, regarding the incident charged in count one of the indictment, that he was a customer directly behind petitioner and that he did not observe evidence of force,

violence or intimidation and that petitioner calmly walked out of the bank (J.A. 13, C.A. App. 265-269); and (4) the testimony of bank teller Maccarotta, regarding the incident charged in count two of the indictment, that she was at the adjacent teller station and did not hear or observe anything. (J.A. 12, C.A. App. 269-273).

The district court denied the requested charge to the jury on bank larceny under 18 U.S.C. § 2113(b). (J.A. 15). Therefore, the district court only instructed the jury on the offense of bank robbery under 18 U.S.C. § 2113(a) as charged in the indictment. (J.A. 17-23).

Petitioner was convicted of the two counts of bank robbery and was sentenced pursuant to the federal sentencing guidelines to 210 months (17½ years) imprisonment on each count to run concurrently, 3 years of supervised release on each count to run concurrently, and a $100 special assessment. (J.A. 24-30, 31-38).

On appeal, the United States Court of Appeals for the Third Circuit affirmed the denial of the requested jury charge. In so doing, the court of appeals held that, as a matter of law, bank larceny in violation of 18 U.S.C. § 2113(b) is not a lesser included offense of bank robbery in violation of 18 U.S.C. § 2113(a). (J.A. 40, 52-53). The court of appeals stated that it was following the textual elements test enunciated in *Schmuck v. United States*, 489 U.S. 705 (1989), to determine whether the elements of the lesser offense were a subset of the greater offense. (J.A. 45-46). However, rather than analyzing the texts of each statute, the court of appeals looked for the appearance, in both statutes, of the exact same words. Not finding the exact words "intent to steal or purloin" – which appear in

the bank larceny provision, but not in the bank robbery provision – the court of appeals held that this requisite *mens rea* element of bank larceny was not a subset or requisite element of bank robbery. (J.A. 46-48). The court of appeals further concluded that this element of intent was not impliedly included by Congress as an element of the bank robbery statute. (J.A. 47).

SUMMARY OF THE ARGUMENT

For three reasons, bank larceny in violation of 18 U.S.C. § 2113(b) is a lesser included offense of bank robbery in violation of 18 U.S.C. § 2113(a). First, an examination of the language of these statutes reveals that Congress employed the dictionary definition of the words "steal" and "purloin," contained in the bank larceny provision, when it wrote the bank robbery provision. That is, 18 U.S.C. § 2113(a) contains the element "takes or attempts to take, from the person" and the word "steal" is commonly defined as "to take the property of another." *See, e.g., Webster's New Collegiate Dictionary* 1138 (2d ed. 1974). The word "purloin" is a synonym of "steal." *Id.* at 937. Therefore, the text of these statutes with respect to these terms, are alternative means of defining the same element. Also, absent a clear and specific statement by Congress that a particular criminal statute does not require a *mens rea*, this element of intent is presumed to exist. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994) (collecting and analyzing cases). Because the text of the bank robbery statute is devoid of such an express

statement, "intent" or *mens rea* is presumed to be a requisite element of bank robbery in violation of 18 U.S.C. § 2113(a). The intent to steal is thus an element of both the bank larceny and bank robbery statutes. Simply stated, there can be no robbery without larceny.

Secondly, the above reading of these statutory provisions is consistent with common law definitions, understandings and traditions. The conclusion that larceny is a lesser included offense of robbery has a lineage stretching deep into the history of English and American common law. Congress incorporated this tradition by using the language of the common law in defining bank robbery and bank larceny.

Finally, the legislative history of 18 U.S.C. § 2113, *Bank Robbery and incidental crimes*, and its antecedent statutes, clearly shows that bank larceny is a lesser included offense of bank robbery. To conclude otherwise would require a finding that Congress intended that bank robbery be a strict liability offense requiring no proof of criminal intent – an absurd result. Nowhere in the drafting of the bank robbery statute, the amending of the statute, or the legislative history of the statute has Congress stated such an intention.

ARGUMENT

I. Under the Textual "Elements" Test, Bank Larceny Is a Lesser Included Offense of Bank Robbery.

In *Schmuck v. United States*, 489 U.S. 705 (1989), this Court adopted the "elements approach" to deciding whether a defendant is entitled, under Federal Rule of

Criminal Procedure 31(c),[2] to have the jury instructed on a lesser included offense of the crime charged. Under the "elements test,"

> one offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).

489 U.S. at 716. This "comparison is appropriately conducted by reference to the statutory elements of the offenses in question. . . . " *Id.* at 718.

Significantly, this Court in *Schmuck* stated that the comparison must be "textual." *Id.* at 720. The Court did not state, however, that the *exact same words* defining an element of the lesser offense must appear in the definition of the element in the greater offense. The critical distinction between a "textual" comparison to determine a "subset," versus an "exact same words" comparison, is the cause of the error in the Third Circuit's opinion below.

In this case, the Third Circuit stated that "[i]t is obvious that the definition of bank robbery in subsection (a) does not include an element that the defendant have the 'intent to steal or purloin.' On the other hand, bank larceny, as defined in subsection (b) includes this element." 126 F.3d 200, 204. (J.A. 46, Pet.App.9). Nevertheless, the bank robbery statute contains the dictionary

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[2] Rule 31(c) provides, in relevant part, that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged." Fed. R. Crim. P. 31(c).

definition of "steal or purloin." That is, 18 U.S.C. § 2113(a) contains the element "takes or attempts to take, from the person" and the word "steal" is commonly defined as "to take the property of another." *See, e.g., Webster's New Collegiate Dictionary* 1138 (2d ed. 1974). The word "purloin" is a synonym of "steal." *Id.* at 937. Therefore, the terms employed in the text of the bank robbery and bank larceny statutes are alternative means of defining the same element.

The element "steal or purloin" contained in the bank larceny statute, 18 U.S.C. § 2113(b), is by definition contained in the bank robbery statute, 18 U.S.C. § 2113(a) ("take or attempt to take, from the person"). Because the only other difference is the "force and violence or intimidation" element unique to bank robbery, bank larceny is a textual subset of – and therefore a lesser included offense of – bank robbery within the meaning of the "elements" test adopted in *Schmuck v. United States*.

The Third Circuit's approach is also inconsistent with this Court's jurisprudence regarding the presumptive implied intent element in federal criminal statutes. The federal bank robbery statute does not, as the Third Circuit noted, contain an express requirement that the intent to steal be proved as an element of the offense. But this is far from the end of the matter. In numerous cases this Court has "interpret[ed] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."[3] *United States*

[3] The only exceptions are strict liability statutes "that regulate potentially harmful or injurious items." *Staples v.*

v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994) (collecting and analyzing cases). Authorities such as these demonstrate that the Third Circuit's conclusion in this case, according to which bank larceny is not a lesser included offense of bank robbery because the latter lacks *any* intent element, is far outside the mainstream of federal criminal jurisprudence.

For example, in *Staples v. United States*, 511 U.S. 600 (1994), the question presented was whether, to obtain a conviction under section 5861(d) of the National Firearms Act, 26 U.S.C. § 5861(d), the government must prove that the defendant knew that the weapon he possessed had the characteristics that brought it within the prohibition of that section.[4] The Court held that the government must prove such knowledge, reasoning in part as follows:

> Section 5861(d) is silent concerning the *mens rea* required for a violation. . . . Nevertheless, silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal. On the contrary, we must construe the statute in light of the background rules of the common law, in

United States, 511 U.S. 600, 607 (1994). "Such public welfare offenses have," however, "been created by Congress, and recognized by this Court, in '*limited* circumstances.' " *Id.* (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978)) (emphasis added).

[4] Section 5861(d) makes it a crime to possess a fully automatic firearm that is not properly registered with the federal government.

> which the requirement of some *mens rea* for a crime is firmly embedded.

511 U.S. at 605. After distinguishing the case law on strict liability offenses, this Court concluded that "the background rule of the common law favoring *mens rea* should govern interpretation of § 5861(d)." *Id.* at 619. In other words, the decision in *Staples* (and similar cases) simply illustrates the basic proposition, long a feature of the common law of crimes, that, "as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all." 4 William Blackstone, *Commentaries* *21.

The bank robbery statute seeks to punish "[w]hoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank." 18 U.S.C. § 2113(a). In order to conclude that bank larceny is distinguished from bank robbery by the intent to steal, one must first conclude that the bank robbery provision does *not* include this "intent to steal" element.[5] Such a conclusion, however, is directly contrary to the same "background rule of the common law favoring *mens rea*" that was held to govern the decision in cases such as *Staples*, 511 U.S. at 619, and there is nothing

[5] According to the Third Circuit, "the subjective intent of a bank robber to steal is irrelevant." 126 F.3d at 204. (J.A. 47, Pet. App. 9). This conclusion, which makes bank robbery a strict liability offense on a par with the regulatory offenses discussed in *Staples*, 511 U.S. at 607, is absurd.

in the nature of bank robbery to justify such a sharp departure from precedent. General principles of federal criminal statutory interpretation alone, therefore, counsel reversal of the Third Circuit's decision in this case. Moreover, still more specific common law traditions that define the relationship of larceny to robbery compel the same conclusion.

II. The Bank Robbery and Bank Larceny Provisions Mirror the Common Law, under which Larceny is a Lesser Included Offense of Robbery.

This Court has long recognized that "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law." *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980). Indeed, "[i]t is a familiar 'maxim that a statutory term is generally presumed to have its common-law meaning.' " *United States v. Evans*, 504 U.S. 255, 257 (1992) (quoting *Taylor v. United States*, 495 U.S. 575, 592 (1990)). This common law background guides the proper construction of federal criminal statutes, and Congress must express its intent to depart from common law definitions in the clearest terms. In the seminal case of *Morissette v. United States*, 342 U.S. 246 (1952), the Court reversed the defendant's conviction on the ground that 18 U.S.C. § 641, an anti-theft statute concerning government property, requires proof of criminal intent despite the statute's lack of an express intent element. As the Court explained in *Morissette*:

> where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were

> attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them.

342 U.S. at 263; *see also United States v. Turley*, 352 U.S. 407, 411 (1957) ("[W]here a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning.") The Third Circuit, however, ignored *Morissette* and its progeny and thus failed to appreciate the significance of the traditional common law language used to define both robbery and larceny.

At common law, robbery was considered an aggravated form of larceny. In his chapter on "Offences Against Private Property," Blackstone defined "simple larceny" as "the felonious taking and carrying away of the personal goods of another." 4 William Blackstone, *Commentaries* *229. He emphasized that "[t]his taking, and carrying away, must also be *felonious*; that is, done *animo furandi*: or, as the civil law expresses it, *lucri causa*."[6] *Id.* at *232. Robbery, in turn, was simply an aggravated, or "compound," form of larceny.[7]

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[6] "Animo furandi" is the "intent to steal," and "lucri causa" means "for the sake of lucre, or gain." *Black's Law Dictionary* 81, 855 (5th ed. 1979).

[7] Blackstone distinguished between simple and "mixed or compound" larceny, the latter of which "has all the properties of the former, but is accompanied with either one or both of the aggravations of a taking from one's *house* or *person*." *Id.* at *239.

Specifically, "violence, or putting in fear, is the criterion that distinguished robbery from other larcenies." *Id.* at *242. Blackstone thus defined robbery as "[o]pen and violent larceny from the person," and "the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear." *Id.* Other treatises on the English common law of crimes recognize these principles.[8]

Both larceny and robbery thus required proof of the same criminal intent to steal. It follows from this principle that, at common law, a charge of robbery could not be sustained where the intent to steal was found lacking. 2 *East's Pleas of the Crown* ch. 16, § 98 at 661-62 (1803 ed.). For example, in *The Fisherman's Case* (1528),[9] a robbery

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[8] 2 *East's Pleas of the Crown* ch. 16, § 1 (1803 ed.) (larceny and robbery "are intimately connected, the one being included in the other"); *id.* § 124 (robbery, "an aggravated larceny," is the "felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear"); 1 *Hawkins' Pleas of the Crown* ch. 33, § 1 (1716 ed.) (larceny is "a felonious and fraudulent taking, and carrying away, by any Person, of the mere personal Goods of another, not from the Person, nor out of His house, above the Value of twelve pence"); *id.* ch. 34, §§ 1, 3 (robbery, a form of "[m]ixt or complicated larceny," is "a felonious and violent taking away from the Person of another, Goods or Money to any Value, putting him in Fear"); 2 *Russell on Crimes* 98 (4th ed. 1865) ("Robbery from the person appears to be well defined as 'a felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence, or putting him in fear.' "); *id.* 101 ("robbery is an aggravated species of larceny").

[9] 14(2) Digest ¶ 8862 (2d reissue, 1993) (dating *The Fisherman's Case* to 1528).

charge was defeated on the ground that the accused gave money in exchange for the victim's property. According to the report of the case in *East's Pleas of the Crown*:

> A traveler met a fisherman with fish, who refused to sell him any; and he by force and putting in fear took away some of his fish, and threw him money much above the value of it: and judgment was respited, because of the doubt whether the intent were felonious on account of the money given.

Id. Similarly, taking the property of another from his person by violence under a mistaken claim of right is not robbery. 2 *Russell on Crimes* 105 (4th ed. 1865) ("If a party *boná fide* believing that property in the personal possession of another belongs to him, take the property away from such person with menaces and violence, this is not robbery. . . . ") For example, in *Rex v. Hall*, a man indicted for robbing a gamekeeper of trap wire and a captured pheasant was acquitted on the ground that he had a good faith belief that he was recovering his own property. 172 Eng. Rep. 477, 478 (Gloucester Assizes 1828) ("if the Jury think that he took them under a *bona fide* impression that he was only getting back the possession of his own property, there is no *animus furandi*, and I am of the opinion that the prosecution must fail").[10]

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[10] *See also Regina v. Skivington*, 1 All E.R. 483 (C.A. 1967). In *Skivington*, the court reversed a robbery conviction, reasoning that the accused's demand for his wife's wages from her employer, although made at knife point, was made under a good faith claim of right. According to the court, "larceny is an ingredient of robbery, and if the honest belief that a man has a claim of right is a defense to larceny, then it negatives one of the ingredients in the offense of robbery." *Id.* at 485.

As these authorities make clear, larceny was a lesser included offense of robbery at common law. The English courts have adhered to this view down to the present time. *See, e.g., Regina v. Desmond*, 3 All E.R. 587, 591 (1964) (reducing robbery conviction to larceny conviction, on ground that in "the present case of robbery with violence, the first thing that the prosecution must do is to prove larceny and then go on to prove that that larceny which they have proved has occurred in certain particular circumstances"). Numerous state courts in this country, likewise, recognized this feature of the common law of crimes at the turn of the previous century. *See, e.g., People v. Clary*, 13 P. 77, 78 (Cal. 1887) ("Robbery is larceny, with the element of force or intimidation added."); *Duffy v. State*, 56 N.E. 209, 209 (Ind. 1900) ("It is true, the principal charge against appellant, under the indictment of which he was convicted, is that of robbery. The offense, however, of larceny, is included and involved in that charge."); *State v. Perley*, 30 A. 74, 76 (Me. 1894) ("robbery is characterized by the common law as compound or aggravated larceny"); *People v. Kennedy*, 11 N.Y.S. 244, 246 (N.Y. Gen. Term 1890) ("There can be no robbery without larceny, and hence the accusation of robbery includes that of larceny, the greater including the lesser."); *State v. Hatch*, 116 P. 286, 287 (Wash. 1911) ("Robbery includes larceny; the essential difference between them being the element of force or violence, necessary to establish robbery, but not an essential of larceny."). Finally, the state courts in the United States continue to observe today that larceny is a lesser included offense of robbery. *See, e.g., State v. White*, 369 S.E.2d 813, 817 (N.C. 1988) ("larceny is a lesser included offense of armed robbery"); *People v.*

Marcio, 659 N.Y.S.2d 983, 983 (N.Y. App. Div.) ("petit larceny is a lesser-included offense of robbery in the second degree"), *appeal denied*, 664 N.Y.S.2d 760 (N.Y. 1997).

The common law status of larceny as a lesser included offense of robbery is not open to doubt. Specifically, centuries of case law and commentary confirm that both robbery and larceny require proof of a criminal intent to steal. Congress acted within this tradition when it criminalized bank robbery and bank larceny using the language of Blackstone and other common law authorities.

III. The History of the Statutes at Issue Confirms That Bank Larceny Is a Lesser Included Offense of Bank Robbery.

The bank robbery and bank larceny provisions of 18 U.S.C. § 2113 took their current form in 1948, as part of the overall recodification of federal criminal law in Title 18. The full history of these two provisions consists of three distinct stages: the passage of the original bank robbery act in 1934; the expansion of the act to criminalize bank larceny and unlawful entry in 1937; and the rephrasing of the act as part of the 1948 recodification. At each of these three stages, Congress used the language of the common law to define the offenses of bank robbery and bank larceny. By using this common law language, Congress included the common law intent element of robbery in the statutory offense. *See Turley*, 352 U.S. at 411; *Morissette*, 342 U.S. at 263.

A. Congress Used Common Law Language in The 1934 Act.

Bank robbery was first made a federal crime in 1934. The relevant act, in terms taken virtually verbatim from common law sources such as Blackstone, East, and Hawkins, was as follows:

> Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Act of May 18, 1934, ch. 304, § 2(a), 48 Stat. 793; *cf.* 4 William Blackstone, *Commentaries* *242 (defining robbery as "the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear"). The phrase "feloniously takes," in particular, signifies that criminal intent to steal is an element of the bank robbery offense. *See Turley*, 352 U.S. at 410 n.4 ("felonious" means "having criminal intent"); *Black's Law Dictionary* 555 (5th ed. 1979) ("Felonious taking. As used in the crimes of larceny and robbery, it is the taking with intent to steal."). Congress thus used the language of the common law to create the offense of bank robbery, including the intent to steal as an element thereof. *Turley*, 352 U.S. at 411; *Morissette*, 342 U.S. 263.

The legislative history of the 1934 act supports the conclusion that Congress included the common law intent element in the bank robbery provision. The bill was introduced as one of thirteen measures proposed by

the Attorney General for helping local law enforcement cope better with the interstate activities of organized crime. 78 Cong. Rec. 2946-47 (1934) (introducing bills prepared by Department of Justice, with explanatory letter from Attorney General). According to the Justice Department, the bank bill in particular was "directed at one of the most serious forms of crime committed by gangsters who operate habitually from one State to another in robbing banks." S.Rep. No. 73-537, at 1 (1934) (quoting Department of Justice memorandum); *see also Jerome v. United States*, 318 U.S. 101, 102 (1943) (bank robbery act responded to concerns "over interstate operations by gangsters against banks – activities with which local authorities were frequently unable to cope").

In its original form, the bill criminalized not only bank robbery, but also bank burglary and bank larceny. S. 2841, 73d Cong. §§ 2-4 (1934) (reprinted at 78 Cong. Rec. 5738). The House Judiciary Committee, however, eliminated the larceny and burglary subsections, putting the bill in the form in which it was eventually passed. *See* 78 Cong. Rec. 8132-33 (House debate on and passage of S. 2841); H.R. Rep. No. 73-1598, at 1 (1934) (conference report recommending that "the Senate recede from its disagreement to the amendments of the House"). As Representative Hatton Sumners of Texas explained in debate, "we are going rather far in this bill, since all the property is owned as a rule, by the citizens of the community where the bank is located. The committee was not willing to go further. . . . " 78 Cong. Rec. 8133. The House's emphasis on a narrow act, limited to bank robbery, supports the conclusion that this offense, like its common law analogue, includes an intent element, for absent the

intent element, the definition of bank robbery would be much broader and it would sweep a broader range of conduct within the reach of the federal criminal law.

The jurisdictional provision of the 1934 act sheds further light on Congress' intent in enacting the bank robbery prohibition. According to the act, "[j]urisdiction over any offense defined in this Act shall not be reserved exclusively to courts of the United States." Act of May 18, 1934, ch. 304, § 4, 48 Stat. 793. In other words, state courts – the courts that had long been presiding over common law and state statutory robbery trials – could try federal bank robbery cases. As the House report on the bill explained, after noting the jurisdictional provision,

> [t]here is no intention that the Federal Government shall supersede the State authorities in this class of cases. It will intervene only to cooperate with local forces when it is evident that the latter cannot cope with the criminals.

H.R. Rep. No. 73-1461, at 2 (1934). This jurisdictional provision, present in the bill from its inception, manifested Congress' intent to frame a criminal measure that would assist – not displace – local law enforcement efforts. This intent to assist, rather than displace, the states is furthered by a construction of bank robbery that incorporates, rather than rejects, the longstanding intent element of common law robbery. *See Jerome*, 318 U.S. at 105 ("[W]here Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute."). The Third Circuit's more expansive definition of bank robbery, according to which no criminal intent need be proved, simply ignores

this legislative history and frustrates congressional intent.

B. The 1937 Act, Like The 1934 Act, Relies on Common Law Language.

In 1937, Congress amended the 1934 measure to criminalize bank larceny and unlawful entry of a bank. *See* Act of Aug. 24, 1937, ch. 747, 50 Stat. 749 (adding larceny and unlawful entry offenses). These additional prohibitions, like the bank robbery statute, used the language of the common law: "whoever shall take and carry away, with intent to steal or purloin, any property or money"; "whoever shall enter or attempt to enter any bank . . . with intent to commit in such bank . . . any felony or larceny." *Id.* The terms of the current statute are essentially the same. *See* 18 U.S.C. § 2113(b) ("Whoever takes and carries away, with intent to steal or purloin . . . "). Importantly, the title of the 1937 act, "AN ACT To amend the bank-robbery statute to include burglary and larceny," also expressly adopts the nomenclature of common law crimes. This usage in the act's title provides further support for the conclusion that these offenses include the common law intent element. *See Almendarez-Torres v. United States*, ___ U.S. ___, 118 S.Ct. 1219, 1226 (1998) (" 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute") (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947)). Finally, the definition of bank robbery – "[w]hoever . . . feloniously takes" – remained unchanged in the 1937 act. Act of Aug. 24, 1937, ch. 747, 50 Stat. 749.

The 1937 amendment, like the anti-robbery statute before it, was prompted by a request of the Attorney General. According to the Attorney General:

> [t]he fact that the [1934] statute is limited to robbery and does not include larceny and burglary has led to some incongruous results. A striking instance arose a short time ago, when a man was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting any one in fear – necessary elements of the crime of robbery – and was about to leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute.

H.R. Rep. No. 75-732, at 1-2 (1937) (reprinting letter from Attorney General); *see also* S. Rep. No. 75-1259, at 1-2 (1937) (reprinting same letter). The facts the Attorney General summarized clearly constitute common law larceny, but not robbery. The purpose of the bill was thus to create, among other things, the lesser included offense of bank larceny. *See Prince v. United States*, 352 U.S. 322, 327 (1957) ("The only factor stressed by the Attorney General in his [1937] letter to Congress was the possibility that a thief might not commit all the elements of the crime of robbery. *It was manifestly the purpose of Congress to establish lesser offenses.*") (emphasis added).

C. The 1948 Recodification Retained Intent Elements of Larceny and Robbery.

As this Court has observed, "[t]he 1948 Revision was not intended to create new crimes but to recodify those then in existence." *Morissette*, 342 U.S. at 269 n.28. The bank robbery and bank larceny provisions were recodified as subsections (a) and (b), respectively, of 18 U.S.C. § 2113, and in substantially the same terms they have today. Act of June 25, 1948, ch. 645, § 2113, 62 Stat. 683, at 796-97 (1948).

The textual change of note for the present case is the deletion of the modifier "feloniously" from the bank robbery provision. *Compare* 12 U.S.C. 588b(a) (1940) ("Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another . . . ") *with* 18 U.S.C. § 2113(a) (1948) ("Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another . . . "). As was noted above, the modifier "feloniously" is the common law term signifying the element of criminal intent. In this case, the Third Circuit took the deletion of "feloniously" as possible "support for the proposition that intent was not conceived as an element of the crime." 126 F.3d at 205 (J.A. 50). The Third Circuit's reasoning is contrary both to the legislative history of the 1948 recodification and to this Court's precedent.

First, the Third Circuit's reasoning cannot be reconciled with the decision in *Morissette*. *Morissette*, like the case at bar, involved a statute in which the expressed intent element was deleted from the text as part of the

1948 recodifiction. *See Morissette*, 342 U.S. at 266 n.28 (reviewing legislative history of 18 U.S.C. § 641 and its antecedents). As was explained above, *Morissette* concluded that the intent element remained part of the anti-theft statute at issue, holding that Congress must do more than fail to mention criminal intent if it wishes to delete the intent element from the federal version of a common law crime. *Id.* at 263 ("In such case, absence of contrary direction [from Congress] may be taken as satisfaction with widely accepted definitions, not as a departure from them."). By parity of reasoning, the deletion of the common law criminal intent term "feloniously" from the statute at issue here cannot, by itself, be construed as an elimination of the intent element from the antecedent bank robbery statute. The Third Circuit essentially turns *Morissette* on its head, reasoning that Congress should have expressed its desire to *preserve*, rather than *eliminate*, the element of criminal intent from the bank robbery statute. *See Mosley*, 126 F.3d at 205. ("Congress' failure to give some indication that intent was to remain an element of bank robbery may provide support for the proposition that intent was not conceived as an element of the crime.") (J.A. 50). This inversion of *Morissette* cannot be sustained.

This Court's decision in *Prince v. United States*, 352 U.S. 322 (1957), is equally problematic for the respondent in this case. In *Prince*, the Court rejected the government's contention that, under 18 U.S.C. § 2113, "unlawful entry and robbery are two offenses consecutively punishable in a typical bank robbery situation." *Id.* at 324. Mr. Prince, having been convicted of both unlawful entry and bank robbery, was sentenced to 20 years for robbery and 15

years for unlawful entry, to be served consecutively. *Id.* at 324. After analyzing the legislative history of section 2113, *id.* at 325-28, the Court concluded that the unlawful entry offense merges with the completed robbery. Critical to the Court's conclusion was the premise that both unlawful entry and robbery share the same criminal intent to steal:

> the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather *the heart of the crime is the intent to steal. This mental element merges into the completed crime* if the robbery is consummated.

Id. at 328 (footnote omitted) (emphasis added). Of course, the intent to steal at the "heart" of unlawful entry cannot merge into the offense of bank robbery unless bank robbery itself requires the intent to steal. The Third Circuit made no effort to reconcile its decision with the result or the reasoning of *Prince*.[11]

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[11] The decision in *Bell v. United States*, 462 U.S. 356 (1983), does nothing to reduce the force of *Prince* in this case. In *Bell*, the Court held that the "take" element of bank larceny, 18 U.S.C. § 2113(b), is satisfied by proof that the defendant took the property by false pretenses, a method of taking that was outside the scope of larceny at common law. 462 U.S. at 358-62. There is, of course, nothing incongruous in concluding that one aspect of a federal criminal offense has been broadened from its common law confines, while another aspect of the very same offense

Second, the legislative history of the 1948 recodification indicates that Congress did not eliminate the intent element from the bank robbery provision. According to the comprehensive House committee report that accompanied the 1948 recodification, the only significant change in section 2113 was to the unlawful entry provision of subsection (a). H.R. Rep. No. 80-304, at A135 (1947). This change – replacing the phrase "any felony or larceny" with "any felony affecting such bank and in violation of any statute of the United States, or any larceny" – simply codified the holding in *Jerome v. United States*, 318 U.S. 101, 108 (1943) (The term "felony" in 1937 act embraces only federal felony offenses and not felonies proscribed by state law and thereby avoided confusion over possibly incorporating state felony provisions by reference). *See* H.R. Rep. No. 80-304, at A135 ("Change conforms with *Jerome*"). Other changes to the recodified provisions, such as the deletion of "feloniously" from the robbery provision, are described merely as "changes in phraseology." *Id.* Moreover, the deletion of "feloniously" from section 2113 is attributable to one of the general goals of the 1948 recodification – namely, eliminating unnecessary felony classifications. As the Seventh Circuit explained in *United States v. Richardson*:

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continues to hew to the common law definition for that offense. For example, this Court recently construed the Hobbs Act, 18 U.S.C. § 1951, in just this manner. *See Evans v. United States*, 504 U.S. 255, 263-64 (1992) ("Although the present statutory text is much broader than the common law definition of extortion . . . the portion of the statute that refers to official misconduct continues to mirror the common-law definition.") (footnote omitted).

> Generally, in the 1948 codification of the criminal statutes an effort was made to avoid redundant use of the words "felony" and "misdemeanor" and the unnecessary use of the words "and on conviction thereof" where they preceded "shall be punished." Most references to "felony" and "misdemeanor" were considered redundant because § 1 of Title 18 [now repealed] defined them for purpose of the entire code.

687 F.2d 952, 957 (7th Cir. 1982) (internal citation omitted). Contrary to the Third Circuit's view, Congress clearly did not intend to eliminate the requirement that the intent to steal be proved in a bank robbery case by eliminating the modifier "feloniously" from subsection (a) of section 2113.

In sum, bank larceny is a lesser included offense of bank robbery. Although the bank robbery statute does not require proof of intent to steal in those very words, Congress clearly incorporated the traditional common law element of intent in defining bank robbery. Bank larceny requires proof of this same intent to steal. Therefore, the elements of bank larceny are a textual subset of the elements of bank robbery, and therefore, as a matter of law, a lesser included offense within the "elements" test. *See Schmuck*, 489 U.S. at 716.

CONCLUSION

For the foregoing reasons, Mr. Mosley respectfully requests that the judgment of the Third Circuit be reversed and the case be remanded for further proceedings.

Respectfully submitted,

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No. 97-7213

In the Supreme Court of the United States

OCTOBER TERM, 1997

SYLVESTER MOSLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether bank larceny, 18 U.S.C. 2113(b), is a lesser included offense of bank robbery, 18 U.S.C. 2113(a).

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Missouri v. *Hunter*, 459 U.S. 359 (1983) 30
Morissette v. *United States*, 342 U.S. 246 (1952) 8, 16, 32, 33
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Muscarello v. *United States*, No. 96-1654 (June 8, 1998) 20, 33, 34
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Staples v. *United States*, 511 U.S. 600 (1994) 9, 16, 33
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United States v. *Arambasich*, 597 F.2d 609 (7th Cir. 1979) 14
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United States v. *Baker*, 985 F.2d 1248 (4th Cir. 1993), cert. denied, 510 U.S. 1040 (1994) 34
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United States v. *Johnston*, 543 F.2d 55 (8th Cir. 1976) 16
United States v. *Lajoie*, 942 F.2d 699 (10th Cir.), cert. denied, 502 U.S. 919 (1991) 36
United States v. *Lanier*, 117 S. Ct. 1219 (1997) 28
United States v. *Lewis*, 628 F.2d 1276 (10th Cir. 1980), cert. denied, 450 U.S. 924 (1981) 18
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Cases—Continued: Page

United States v. *Payne*, 805 F.2d 1062 (D.C. Cir. 1986) 34
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Act of Aug. 24, 1937, ch. 747, 50 Stat. 749 24
Act of July 3, 1946, ch. 537, § 1(b), 60 Stat. 420 14
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Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 98-473, Tit. II, § 218(a)(1), 98 Stat. 2027 27
Hobbs Anti-Racketeering Act, ch. 569, 48 Stat. 979, 18 U.S.C. 1951 ..... 6, 14, 27
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Rev. Stat. § 5209 (1875 ed.), as amended, Act of Sept. 26, 1918, ch. 177, § 5209, 40 Stat. 972 23
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Fed. R. Evid. 403 4
Fed. R. Evid. 404 4

Miscellaneous:

Black's Law Dictionary (6th ed. 1986) 20
4 W. Blackstone, *Commentaries* 22
2 W. Burdick, *The Law of Crime* (1946) 22
143 Cong. Rec. S1661 (daily ed. Feb. 26, 1997) 15
H.R. Rep. No. 732, 75th Cong., 1st Sess. (1937) 24
H.R. Rep. No. 304, 80th Cong., 1st Sess. (1947) ... 25, 27, 28
H.R. Rep. No. 851, 102d Cong., 2d Sess. Pt. 1 (1992) 15
W. LaFave & A. Scott, *Substantive Criminal Law* (1986 & Supp. 1998):
Vol. 1 ..... 12, 17
Vol. 2 ..... 19, 20, 22, 26
R. Perkins & R. Boyce, *Criminal Law* (3d ed. 1982) .. 19, 20, 22, 23

Miscellaneous—Continued: Page

S. 2841, 73d Cong., 2d Sess. (1934) 23
L. Sand et al, *Modern Federal Jury Instructions* (1997):
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United States Sentencing Comm'n *Guidelines Manual* (1995) 31-32
Webster's Third New International Dictionary (1986) 19, 20

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OPINION BELOW

The opinion of the court of appeals (J.A. 39-53) is reported at 126 F.3d 200.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1997. A petition for rehearing was denied on December 15, 1997 (Pet. App. 1). The petition for a writ of certiorari was filed on December 22, 1997, and was granted, limited to the first question presented, on March 23, 1998. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND RULE INVOLVED

Section 2113 of Title 18 and Rule 31(c) of the Federal Rules of Criminal Procedure are set forth in an appendix to this brief.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on two counts of bank robbery, in violation of 18 U.S.C. 2113(a). He was sentenced to concurrent terms of 210 months' imprisonment. J.A. 24-26, 31-33. The court of appeals affirmed. J.A. 52-53.

1. On November 9, 1995, petitioner entered the First Fidelity Bank at 1008 Madison Avenue, in Paterson, New Jersey, approached a teller, and displayed a sign reading "HOLD UP." The teller became very scared and nervous. After petitioner placed his hands on the counter, petitioner said, in a demanding tone, "Can I have all your money?" The teller gave petitioner some "bait money." Petitioner threw that money back at her. Feeling frightened, the teller gave him more money. Petitioner then left the bank. The teller reported the robbery to a supervisor. J.A. 43; C.A. App. 158-162.

On November 20, 1995, petitioner entered the First Fidelity Bank on Fifth Avenue in Paterson, approached a teller, told her, "This is a hold up," and asked for big bills first. Petitioner gestured towards his coat as if he had a weapon. The teller became so upset that she lost bladder control. She threw some money on the counter and then immediately walked towards the bathroom. The teller was "hysterical" and told another bank employee that she had just been robbed. J.A. 41-42; C.A. App. 131-134.

That same day, FBI Special Agent John Conway arrested petitioner. During an interview, petitioner admitted that he and an accomplice had just robbed a bank. Conway seized some of the bank's money from petitioner's socks. J.A. 42; C.A. App. 179-183.

2. Petitioner was charged with two counts of bank robbery, in violation of 18 U.S.C. 2113(a). Petitioner's defense at trial was that he committed only bank larceny, rather than bank robbery, because he did not use force, violence, or intimidation to obtain funds from the banks. On cross-examination, Agent Conway agreed that he could not see force or violence on the November 20 surveillance tape, which showed petitioner robbing the second bank. J.A. 42. Agent Conway also stated that he could not "pinpoint" intimidation on the tape, but emphasized that the tape was "not a true depiction" of the events in the bank, in part because it lacked audio. C.A. App. 198-199, 212. Agent Conway did, however, testify that a still photograph from the November 20 tape showed petitioner with his right arm inside his jacket, which was consistent with the teller's testimony that petitioner had made a gesture to his coat as if he had a gun. *Id.* at 213-214.

The Reverend Louis McDowell testified that he was standing behind petitioner during the November 20 robbery and that he did not hear petitioner say anything to the teller, make any motions, or do anything that could be characterized as force or violence. McDowell admitted that the teller was nervous when she gave petitioner the money. J.A. 42; C.A. App. 265-266, 268.

At the close of evidence, petitioner asked that the jury be instructed that it could return a verdict finding petitioner guilty of bank larceny, in violation of 18

U.S.C. 2113(b) (Supp. II 1996). J.A. 4-6. The district court denied the motion, ruling that the evidence did not warrant such an instruction. J.A. 14. The court stated that no reasonable juror would have concluded that the tellers had given petitioner money voluntarily rather than as a result of intimidation. J.A. 14-15.

3. The court of appeals affirmed. J.A. 39-53. On appeal, petitioner challenged the failure to give a bank larceny instruction, contending that bank larceny is a lesser included offense of bank robbery. Under Rule 31(c) of the Federal Rules of Criminal Procedure, he argued, he was entitled to an instruction on the lesser included offense. The court of appeals disagreed, holding that bank larceny is not a lesser included offense of bank robbery.

The court of appeals explained that, in *Schmuck* v. *United States*, 489 U.S. 705 (1989), this Court had held that the determination of whether one offense is a "lesser included" or "necessarily included" offense of another depends on the elements of the offenses. Where the lesser offense requires proof of an element not required for the greater offense, it is not a lesser or necessarily included offense, and no instruction is required under Federal Rule of Criminal Procedure 31(c). J.A. 39-40, 45.[1]

Applying *Schmuck*, the court noted that bank robbery does not expressly have an "intent to steal or purloin" element, but that bank larceny does. Nor is an "intent to steal or purloin" element implied in bank

[1] Petitioner also argued that the district court erred in admitting evidence of his prior bank robbery conviction under Rules 403 and 404 of the Federal Rules of Evidence. The court of appeals summarily rejected that contention. J.A. 40 n.1.

robbery. The court emphasized that, under circuit precedent, the subjective intent of a bank robber to steal is irrelevant; it is sufficient if he resorts to force, violence, or intimidation to achieve his purposes. J.A. 45-51. The court recognized that robbery and larceny were greater and lesser offenses at common law, but it found no indication in the history and evolution of Section 2113 that Congress intended to codify that common law rule, especially since the bank robbery and bank larceny provisions were adopted at different times. J.A. 47-51. The court of appeals noted that cases from other circuits had language suggesting that bank larceny is a lesser included offense, but ultimately concluded that those cases "are not consistent with the methodology of *Schmuck*." J.A. 51-52.

SUMMARY OF ARGUMENT

I. Bank larceny is not a lesser included offense of bank robbery.

A. Under *Schmuck* v. *United States*, 489 U.S. 705 (1989), the resolution of the lesser included offense issue turns on whether all of the statutory elements of the putative lesser offense are necessarily established by proving the charged offense. Bank larceny contains elements not found in bank robbery. Section 2113(b) bank larceny requires the government to prove that the defendant (1) had the specific "intent to steal or purloin" the bank's property; (2) "carrie[d] away" that property; and (3) took property that had a monetary value. 18 U.S.C. 2113(b) (Supp. II 1996). Section 2113(a) bank robbery contains none of those requirements. 18 U.S.C. 2113(a).

The omission of a specific intent requirement in the first paragraph of Section 2113(a) is significant.

Congress provided specific intent elements in other subsections of Section 2113. For example, the bank burglary offense set forth in the second paragraph of Section 2113(a) requires an "intent to commit in such bank * * * any felony affecting such bank." The presumption is that the omission of a counterpart specific intent element for bank robbery was deliberate. See *Bates* v. *United States*, 118 S. Ct. 285, 290 (1997). That conclusion is further supported by the absence of a specific intent to steal requirement in other robbery offenses defined in the criminal code, such as 18 U.S.C. 1951 (Hobbs Act), 18 U.S.C. 2111 (robbery in the special maritime and territorial jurisdiction of the United States), 18 U.S.C. 2118(a) (robbery of controlled substances), and 18 U.S.C. 2119 (Supp. II 1996) (carjacking).

Although Section 2113(a) bank robbery does not contain an express mental element, it is appropriate to infer a general intent requirement. The courts of appeals have consistently held that the defendant must act "knowingly" with respect to each *actus reus* in Section 2113(a). The conclusion that the knowing use of "force and violence, or by intimidation" is a sufficient mental element accords with the purposes behind Congress's enactment of the bank robbery offense. Because of the threat posed to innocent persons in financial institutions, bank robbery causes as much social harm and is just as serious even if the perpetrator lacks a specific intent to deprive the bank permanently of its property.

For similar reasons, the omission of an asportation element and a monetary valuation requirement in Section 2113(a) bank robbery further supports the conclusion that Congress did not intend for bank

larceny in Section 2113(b) to be a lesser included offense of bank robbery.

B. The legislative history does not support petitioner's submission. Although simple larceny was a lesser included offense of robbery at common law, an examination of the language and background of Section 2113 refutes the contention that Congress intended merely to codify the common law robbery and larceny offenses. Congress did not initially enact a bank larceny offense when it proscribed bank robbery in 1934. When it later added a crime for bank larceny, it did so to fill a gap in the statute—the failure to reach the theft of bank property without the use of force, violence, or intimidation. Congress did not indicate in 1937 that it intended bank larceny to be a lesser included offense of the bank robbery crime established in 1934. And as this Court has already recognized, the language of Section 2113 creates a larceny offense that is broader than the common law. See *Bell* v. *United States*, 462 U.S. 356, 360-361 (1983). The same is true of the robbery offense defined in Section 2113.

C. Nor do this Court's cases and canons of statutory construction support petitioner's contention. In *Prince* v. *United States*, 352 U.S. 322 (1957), this Court held that convictions under paragraphs one and two of Section 2113(a) merge if the defendant actually completed the crime of bank robbery. That holding did not entail an analysis of the statutory elements of the offenses contained in Section 2113(a) and (b), as is now required by *Schmuck*, *supra*. The holding in *Prince* may bar certain cumulative punishments under Section 2113 (a result achieved today by the Sentencing Guidelines), but it does not compel the giving of a lesser included offense instruction when

the government charges only bank robbery (and not bank larceny) in the indictment.

Similarly, petitioner's reliance on *Morissette* v. *United States*, 342 U.S. 246 (1952), is misplaced. *Morissette* involved a different larceny statute, in which the Court reasoned that the theft offenses at issue in that case incorporated common law requirements. That conclusion is inconsistent with this Court's interpretation of Section 2113. Finally, because Section 2113 is not ambiguous about the elements of bank larceny and bank robbery, the rule of lenity does not apply in this case.

II. Even if, contrary to our submission, this Court were to hold that the statutory elements of Section 2113(b) create a lesser included offense of Section 2113(a) bank robbery, the district court correctly declined to give a lesser included offense instruction in this case. Federal Rule of Criminal Procedure 31(c) requires such an instruction only if the evidence would permit a rational jury to convict the defendant of the lesser offense while acquitting him of the greater one. The district court here properly concluded that the evidence admitted of only one conclusion: that petitioner obtained the bank's money by the use of intimidation against the tellers. There is no evidence that petitioner obtained the funds from the tellers' voluntary actions. Because no rational juror could reach the conclusion advanced by petitioner, a bank larceny instruction was not required.

ARGUMENT

I. BANK LARCENY IS NOT A LESSER INCLUDED OFFENSE OF BANK ROBBERY

Federal Rule of Criminal Procedure 31(c) provides that a "defendant may be found guilty of an offense

necessarily included in the offense charged." In *Schmuck* v. *United States*, 489 U.S. 705 (1989), the Court held that, for purposes of instructing the jury, the test for determining whether one offense is a "necessarily included" offense of another under Rule 31(c) is the statutory "elements" test. Under that test:

> [O]ne offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).

489 U.S. at 716. See *Hopkins* v. *Reeves*, No. 96-1693 (June 8, 1998), slip op. 7 & n.6.

A. BANK LARCENY CONTAINS STATUTORY ELEMENTS THAT BANK ROBBERY DOES NOT HAVE

Because Congress is solely responsible for defining federal crimes, see *Staples* v. *United States*, 511 U.S. 600, 604-605 (1994), this Court will "ordinarily resist reading words or elements into a statute that do not appear on its face," *Bates* v. *United States*, 118 S. Ct. 285, 290 (1997) (specific intent to defraud is not an element of the offense of misapplication of funds, 20 U.S.C. 1097(a)); *United States* v. *Wells*, 117 S. Ct. 921 (1997) (materiality is not an element of the offense of making a false statement to a federal bank, 18 U.S.C. 1014). That principle is especially apt here because bank robbery and bank larceny are defined in a single provision, thus highlighting the significance of Congress's choice of contrasting terminology. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same

Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates*, 118 S. Ct. at 290 (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

Section 2113 of Title 18 punishes crimes against banks in five subsections, the first two of which are bank robbery (18 U.S.C. 2113(a)) and bank larceny (18 U.S.C. 2113(b)).[2] Bank larceny is not a lesser included offense of bank robbery because Section 2113(b) contains elements not present in Section 2113(a). Nothing in either subsection expresses an intent by Congress to create greater and lesser included offenses between the first paragraph of subsection (a) and subsection (b), as Congress explicitly did in subsections (d) (18 U.S.C. 2113(d)) and (e) (18 U.S.C. 2113(e)) for other offenses established in Section 2113.[3]

[2] Section 2113 punishes diverse crimes against banks. Section 2113(a) provides, in separate paragraphs, that bank robbery and entry into a bank with the intent to commit a felony therein are crimes punishable by up to 20 years' imprisonment. Section 2113(b) provides that bank larceny of property exceeding $1000 is a crime punishable by up to ten years' imprisonment. In a separate paragraph, Section 2113(b) states that bank larceny of property not exceeding $1000 is a crime punishable by a fine of up to $1000 and/or imprisonment not to exceed one year.

Section 2113(c) makes receipt of stolen bank property a crime and provides for the punishment set forth in Section 2113(b). 18 U.S.C. 2113(c). Section 2113(d) states that aggravated assault during a bank robbery or bank larceny is a crime and provides for up to 25 years' imprisonment. 18 U.S.C. 2113(d). Section 2113(e) provides that a homicide or kidnapping committed during the commission of a crime against a bank defined in this section is subject to a minimum of ten years' imprisonment for the kidnapping and life imprisonment for the homicide. 18 U.S.C. 2113(e).

Section 2113(a) provides, in its first paragraph, that, "[w]hoever, by force and violence, or by intimidation, takes, or attempts to take, * * * any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association," is guilty of an offense that is punishable by up to twenty years in prison. 18 U.S.C. 2113(a). Section 2113(b), by contrast, provides that anyone who "takes *and carries away, with intent to steal or purloin*, any property or money or any other thing of value *exceeding $1,000* belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association," is guilty of an offense punishable by up to ten years in prison. 18 U.S.C. 2113(b) (Supp. II 1996) (emphasis added). Section 2113(b) thus requires proof, as the italicized terms indicate, of three elements not present in Section 2113(a): (1) a specific intent to steal or purloin; (2) a requirement that the

[3] Section 2113(d), for example, is a greater offense of those created in subsections (a) and (b), because it provides that "[w]hoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be * * * imprisoned not more than twenty-five years." 18 U.S.C. 2113(d).

Similarly, Section 2113(e) expresses an unequivocal intent to create a greater-included offense by providing that, "[w]hoever, in committing any offense defined in this section, * * * kills any person, * * * shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment." 18 U.S.C. 2113(e).

property be "carr[ied] away"; and (3) a provision that the property taken have a monetary value.

1. ***Bank larceny, unlike bank robbery, requires proof of a specific intent to steal***

a. While bank larceny contains an express "intent to steal or purloin" element, bank robbery has no such mental element in its text. The omission of that phrase is significant. Although the phrases "general intent" and "specific intent" have "been the sources of a good deal of confusion," *United States* v. *Bailey*, 444 U.S. 394, 403 (1980), "[t]he distinction between 'general intent' and 'specific intent' is not without importance in the criminal law," 1 W. LaFave & A. Scott, *Substantive Criminal Law* 315 (1986 & Supp. 1998).

> [T]he most common usage of "specific intent" is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime. Common law larceny, for example, requires the taking and carrying away of the property of another, and the defendant's mental state as to this act must be established, but *in addition* it must be shown that there was an "intent to steal" the property.

1 W. LaFave & A. Scott, *supra*, at 315 (emphasis added). By including a specific intent requirement in Section 2113(b) but not in the first paragraph of Section 2113(a), Congress intended that a prosecution for bank larceny establish a "special mental element * * * above and beyond" the general mental state required for the *actus reus* of the crime. Congress's omission of the specific "intent to steal" from the

first paragraph of Section 2113(a) also contrasts with its provision of a different specific intent element—the "intent to commit in such bank * * * any felony affecting such bank" in the second paragraph of Section 2113(a).[4] That aspect of Section 2113(a) strongly suggests that if Congress had intended to require proof of an "intent to steal" to establish bank robbery, it would have said so expressly. Indeed, one court of appeals has concluded that the omission of a specific intent element in the first paragraph of Section 2113(a) and the inclusion of specific intent elements in the second paragraph of Section 2113(a) and in Section 2113(b) "shows careful draftsmanship." *United States* v. *DeLeo*, 422 F.2d 487, 490 (1st Cir.), cert. denied, 397 U.S. 1037 (1970).

b. The omission of a specific intent requirement in the bank robbery offense in Section 2113(a) is consistent with robbery offenses defined elsewhere in the criminal code. Unlike larceny, which federal law

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[4] The second paragraph of Section 2113(a) is sometimes referred to as the bank burglary offense. The interrelationship between the bank burglary offense, which is not at issue in this case, and Section 2113(b) is not entirely clear. The second paragraph of Section 2113(a) makes it an offense to enter a bank "with intent to commit * * * any larceny." 18 U.S.C. 2113(a). As one commentator has noted:

> [D]espite the fact that section 2113(b) carries a lesser maximum penalty than section 2113(a), it does not seem that section 2113(b) is a lesser included offense of the second paragraph of section 2113(a) * * * . Consequently, when prosecutors are presented with crimes that would seem to be section 2113(b) violations, it appears that they can attempt to prosecute the defendant under the second paragraph of section 2113(a) with no limitations.

3 L. Sand et al., *Modern Federal Jury Instructions* ¶ 53.01, at 53-4 (1997).

has consistently defined to require proof of a specific intent permanently to deprive, robbery has not always been defined that way. In 1946, Congress amended the Hobbs Anti-Racketeering Act (Hobbs Act), 18 U.S.C. 1951, to punish certain extortion and robbery offenses. The 1946 amendment defined robbery as the "unlawful taking * * * of personal property, from the person * * * by means of actual or threatened force, or violence, or fear of injury." Act of July 3, 1946, ch. 537, § 1(b), 60 Stat. 420. No specific intent element was provided. That definition was carried over to the present version of 18 U.S.C. 1951 during the 1948 codification. See Act of June 25, 1948, ch. 645, 62 Stat. 683.[5]

The absence of an express intent to steal element is characteristic of other federal robbery statutes, many of which merely define robbery as the forcible taking of the victim's property and omit any reference to a specific mental requirement. For example, Section 2111 criminalizes robbery in the special maritime and territorial jurisdiction of the United States, and does not contain an express specific intent to steal requirement. 18 U.S.C. 2111. The same is true of Section 2118(a), which Congress enacted in 1984 to criminalize robbery of controlled substances. 18 U.S.C. 2118(a). And Section 2119, which Congress enacted in

[5] Accordingly, courts have held that requests for specific intent instructions in Hobbs Act cases are properly denied, with the requisite intent being knowledge. See, *e.g.*, *United States* v. *Arambasich*, 597 F.2d 609, 614 (7th Cir. 1979) (specific intent instruction not required under Hobbs Act); *United States* v. *Warledo*, 557 F.2d 721, 729 n.3 (10th Cir. 1977) ("Under the clauses of Section 1951, proscribing the obstruction, delay, or attempt to obstruct commerce by robbery or extortion, a general intent to commit those crimes is required.").

1992 to reach carjacking offenses, contains no explicit intent to steal element; rather, it requires proof of an "intent to cause death or serious bodily harm." 18 U.S.C. 2119 (Supp. II 1996).[6] In enacting Section 2119, Congress specifically tracked the language of Sections 2111, 2113, and 2118. See H.R. Rep. No. 851, 102d Cong., 2d Sess. Pt. 1, at 17 (1992). In discussing the "with intent to cause death or serious bodily harm" element of the carjacking statute, Senator Leahy noted in 1997 that "knowingly" is the only mental element required for the usual robbery offense. See 143 Cong. Rec. S1661 (daily ed. Feb. 26, 1997) ("Robbery offenses typically require only what the carjacking statute formerly required by way of scienter, i.e., that property be knowingly taken from the person or presence of another by force and violence or by intimidation.").

Like the omission of a specific intent element in Section 2113(a), the omission of an intent to steal from those other federal robbery statutes cannot be attributed to inadvertence.[7] While common law robbery was generally understood to contain a specific intent to steal element, see pp. 21-23, *infra*, "Congress' silence [in Section 2113(a)] speaks volumes * * * [and] Congress appears to have made the choice quite deliberately" in omitting any such requirement

[6] The proper definition of that intent element is before the Court in *Holloway* v. *United States*, cert. granted, No. 97-7164 (Apr. 27, 1998).

[7] Other—usually older—statutes use the term "rob" or "robbery" without further elaboration. See, *e.g.*, 18 U.S.C. 2112 (robbery of personal property of United States); 18 U.S.C. 2114 (robbery of mail matter); 18 U.S.C. 1661 (robbery ashore). Those statutes, unlike Section 2113(a), retain the common law meaning of robbery. See p. 33, *infra*.

from Section 2113(a). Cf. *United States* v. *Shabani*, 513 U.S. 10, 14 (1994) (holding that absence of an overt act requirement from 21 U.S.C. 846 was dispositive, notwithstanding that such proof was required for common law conspiracy).

c. Although bank robbery has no specific intent to steal element, that does not mean that it lacks a mental element altogether. The "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Staples*, 511 U.S. at 605 (quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436 (1978)). There is a presumption that any federal criminal offense requires a mental element. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). Accordingly, this Court has read a mental element into a criminal statute even where the statute did not expressly provide for one. See *Staples*, *supra* (possession of an unregistered firearm, in violation of 26 U.S.C. 5861(d)); *Bailey*, *supra* (escape, in violation of 18 U.S.C. 751(a)); *United States Gypsum Co.*, *supra* (Sherman Act); *Morissette* v. *United States*, 342 U.S. 246 (1952) (theft, in violation of 18 U.S.C. 641).

In like fashion, the courts of appeals that have ruled that bank robbery is not a specific intent crime have nevertheless construed the statute to contain a "general intent" requirement. See, *e.g.*, *United States* v. *Gonyea*, 140 F.3d 649, 653-654 (6th Cir. 1998); *United States* v. *Fazzini*, 871 F.2d 635, 641 (7th Cir.), cert. denied, 493 U.S. 982 (1989); *United States* v. *Emery*, 682 F.2d 493, 497 (5th Cir.), cert. denied, 459 U.S. 1044 (1982); *United States* v. *Smith*, 638 F.2d 131, 132 (9th Cir. 1981); *United States* v. *Johnston*, 543 F.2d 55, 58 (8th Cir. 1976); *United States* v. *DeLeo*,

supra.[8] Those cases have held that a defendant must be shown to have acted "knowingly" with respect to each *actus reus*, a view that is consistent with the notion that, when a person performs acts proscribed by Congress, criminal liability should be imposed regardless of whether that person desired or merely knew of the practical certainty of the results. See *Bailey*, 444 U.S. at 404; *United States Gypsum Co.*, 438 U.S. at 445; see generally 1 W. LaFave & A. Scott, *supra*, § 3.5.[9]

d. Limiting the mental element of bank robbery to "knowingly" taking by force, violence, or intimidation, instead of an intent to steal, is appropriate in light of the character of that crime. "[T]he gist of [robbery] is a crime against the person." *United States* v. *Mann*, 119 F. Supp. 406, 407 (D.D.C. 1954). Without regard to the robber's intent to steal, the robbery offense warrants sanction because of the fear it instills in the victims and the risk that they will

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[8] Those courts were considering whether diminished capacity is a defense to bank robbery. Because "diminished capacity is a defense only to *specific* intent crimes," evidence of alcohol-induced unconsciousness and other forms of diminished capacity is irrelevant in a Section 2113(a) case because "completed armed bank robbery is a *general* intent crime." *Fazzini*, 871 F.2d at 641; see also *Smith*, 638 F.2d at 132.

[9] In this case, the indictment and the jury instructions establish that the jury found that petitioner committed his robberies with the requisite intent. The indictment alleged that petitioner acted "knowingly and willfully." J.A. 2-3. The jury was instructed that the intimidation element required proof that petitioner acted "knowingly and deliberately." J.A. 19; C.A. App. 355. The jury was charged that the "knowingly" element was to ensure that no person would be convicted of an act done by mistake, accident, or other innocent reason. J.A. 19-22; C.A. App. 355-358.

suffer harm, be it physical or emotional. Bank robberies often occur when employees and customers are in the bank, and robbers often carry and use firearms to gain an advantage over the people inside. After a robbery or attempted robbery, the bank may have to interrupt its business to attend to the needs of the victim, to cooperate with authorities, and to reassure its customers. For those reasons, the bank robbery offense defined in Section 2113(a) punishes the attempt to rob as well as the completed act.

Because the use of force, violence, and intimidation causes social harms regardless of whether the robber has a specific intent to dispossess the bank of its property permanently, it is logical to construe the first paragraph of Section 2113(a) as not requiring a specific intent to steal. The bank robbery statute "describe[s] acts which, when performed, are so unambiguously dangerous to others that the requisite mental element is necessarily implicit in the description." *DeLeo*, 422 F.2d at 491. "It therefore is immaterial for sections 2113(a) and (d) whether the subjective intent of a bank robber is to steal that to which he has no claim or to recover his own deposit; the crime is his resort to force and violence, or intimidation, in the presence of another person to accomplish his purposes." *Ibid.*[10]

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[10] Undoubtedly, most bank robbers will intend to deprive the bank permanently of its property, but that will not invariably be the case. One man robbed a bank solely to be apprehended and returned to prison so he could be treated for his alcohol problem. See *United States* v. *Lewis*, 628 F.2d 1276 (10th Cir. 1980), cert. denied, 450 U.S. 924 (1981). There are likely other kinds of criminals who rob banks primarily to disrupt the bank's business with violence. Terrorists, for example, may well be indifferent to the fate of the bank's property. Those sorts of robberies nevertheless come within the coverage of Section 2113(a).

Larceny, on the other hand, is a crime principally committed against property, see R. Perkins & R. Boyce, *Criminal Law* 343-344 (3d ed. 1982), and the specific intent requirement has always been a critical element of that offense: there is no larceny without an intent to deprive the owner permanently of the property taken. 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.5 (1986 & Supp. 1998). The same cannot be said of bank robbery in violation of Section 2113(a). Congress's decision to distinguish the offenses in Section 2113 thus is a reasonable judgment that the two crimes are different in nature and that the bank larceny offense is not simply a lesser degree of bank robbery.

2. Bank larceny, unlike bank robbery, requires proof that the defendant "carries away" the property

The Section 2113(a) and (b) offenses also have different *actus reus* requirements. Both offenses use the word "take[]" to describe the *actus reus* of the crime. That word is defined as "[t]o get into one's hands or into one's possession, power, or control by force or stratagem." *Webster's Third New International Dictionary* 2329 (1986); cf. *United States* v. *Moore*, 73 F.3d 666, 668-669 (6th Cir. 1996) (using that definition to define "take" in the carjacking statute, 18 U.S.C. 2119 (Supp. II 1996), and holding that "[a]n intent to permanently deprive is not an element of the federal offenses covering the mere 'taking' from the 'person or presence' of another") (citing 18 U.S.C. 2111, 2113, 2118). Section 2113(b), however, *also* requires that the perpetrator "carries away" the

property. The term "carry" is defined as "to move while supporting." *Webster's*, *supra*, at 343; see *Muscarello* v. *United States*, No. 96-1654 (June 8, 1998), slip op. 3. The phrase, "carries away" has common law antecedents, and means "[t]he act of removal or asportation, by which the crime of larceny is completed, and which is essential to constitute it." *Black's Law Dictionary* 194 (6th ed. 1986). That asportation element is not present in the Section 2113(a) offense.

This Court has repeatedly noted that "a court should 'give effect, if possible, to every clause and word of a statute.'" *Moskal* v. *United States*, 498 U.S. 103, 109-110 (1990). That is particularly the case with elements of criminal offenses. See *Ratzlaf* v. *United States*, 510 U.S. 135, 140-141 (1994). Given that Congress specifically used the phrase "carries away" in Section 2113(b), it should not be lightly read into the text of Section 2113(a). See *Bates* v. *United States*, 118 S. Ct. at 290.

That conclusion is especially important here, where the phrase in question had a distinctive common law connotation. As commentators explain, "[a] movement does not amount to asportation unless it is a *carrying-away* movement." R. Perkins & R. Boyce, *supra*, at 324. "The requirement of asportation may be eliminated entirely by statute, * * * but so long as it is retained, the common-law concept of a carrying-away movement should be required." *Ibid.* See also 2 W. LaFave & A. Scott, *supra*, at 348. Robbery as defined in Section 2113(a) should not be encumbered by common law limitations that Congress expressly elected to retain only for the bank larceny offense.

3. *Bank larceny, unlike bank robbery, requires proof that the property has a monetary value*

A third textual element found in bank larceny but not in bank robbery is the requirement that the prosecution prove that the property taken is reducible to a monetary value. Section 2113(b) permits a sentence of up to ten years' imprisonment if the stolen property exceeds $1000 in value, but only a sentence of up to one year imprisonment if the value is less than that amount. Thus, in a Section 2113(b) prosecution, the jury must be instructed to find that the property taken exceeded the amount necessary to trigger the greater punishment. See *United States* v. *Hoke*, 610 F.2d 678, 679 (9th Cir. 1980). Section 2113(a), on the other hand, contains no such monetary requirement. Rather, it proscribes the forceful taking of "any property or money or any other thing of value belonging to" the financial institution at issue, or the attempt to do so. Section 2113(a) thus criminalizes the forceful taking of property without requiring a jury finding as to the value of the property taken.

B. THE LEGISLATIVE HISTORY OF SECTION 2113 DOES NOT SHOW CONGRESSIONAL INTENT TO MAKE BANK LARCENY A LESSER INCLUDED OFFENSE OF BANK ROBBERY

In arguing that bank larceny should be treated as a lesser offense of bank robbery, despite the textual elements of bank larceny not found in the putatively "greater" offense, petitioner relies (Br. 9-10) on the rule of statutory construction that "where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law

meaning." *Moskal*, 498 U.S. at 114 (quoting *United States* v. *Turley*, 352 U.S. 407, 411 (1957)). Because larceny was a lesser included offense of robbery at common law, he maintains that Congress must have intended to make the crime proscribed in Section 2113(b) a lesser included offense of the Section 2113(a) crime. See Pet. Br. 18-21. That argument, however, cannot be squared with the legislative history of Section 2113, or this Court's prior construction of the statute. Those sources demonstrate that Congress did not intend merely to codify the common law in Section 2113, but rather intended to create federal offenses with specific elements designed to address contemporary needs.

1. At common law, larceny was generally defined as the felonious taking and carrying away of the personal goods of another with intent to deprive the owner permanently of his property. See, *e.g.*, 4 W. Blackstone, *Commentaries* *229, *232; 2 W. Burdick, *The Law of Crime* 258-263 (1946). Robbery was an aggravated form of larceny; it contained all of the elements of larceny plus two additional ones: (1) the property must be taken from the person or presence of another (2) by means of force or putting in fear. See 2 W. LaFave & A. Scott, *supra*, §§ 8.2, 8.11, at 333, 437-438. Common law robbery was often defined in simple and undetailed language, such as "the felonious and violent taking of goods or money from the person of another by force or intimidation." *Id.* § 8.11 n.6. The phrase "felonious * * * taking" meant a taking with the intent to deprive the owner permanently of his property. R. Perkins & R. Boyce, *supra*, at 343. Because, under common law, robbery contained all of the elements of larceny (plus the additional elements of personal presence and force),

larceny is a lesser included offense of robbery in those jurisdictions that have retained the common law definitions of the two crimes. See, *e.g.*, *Government of the Virgin Islands* v. *Jarvis*, 653 F.2d 762, 765 (3d Cir. 1981); *United States* v. *Belt*, 516 F.2d 873, 875 (8th Cir. 1975), cert. denied, 423 U.S. 1056 (1976). See generally R. Perkins & R. Boyce, *supra*, at 343 (defining "robbery" as "larceny from the person by violence or intimidation").

2. As already interpreted by this Court's decisions, however, the language and background of Section 2113 reveals that Congress did *not* intend to codify the common law in that provision. Before 1934, banks organized under federal law were protected against embezzlement (Rev. Stat. § 5209 (1875 ed.), as amended by the Act of Sept. 26, 1918, ch. 177, § 5209, 40 Stat. 972), but not robbery, larceny, or burglary, which were punishable only under state law. In 1934, Congress enacted the precursor to Section 2113(a) in response to a series of bank robberies committed by John Dillinger and other criminals who moved from State to State and were able to avoid capture by state authorities. See *Jerome* v. *United States*, 318 U.S. 101, 102-104 (1943) (discussing legislative history of bank robbery statute); *Bell* v. *United States*, 462 U.S. 356, 363-364 (1983) (Stevens, J., dissenting) (same). The Attorney General proposed legislation (S. 2841, 73d Cong., 2d Sess. (1934)) that would have prohibited robbery (§ 4), burglary (§ 3), and theft (§ 2). The 1934 bill passed the Senate in that form, but the House Judiciary Committee, without explanation, struck the burglary and theft provisions from the bill. See *Jerome*, 318 U.S. at 102-104; *Bell*, 462 U.S. at 364 & n.2 (Stevens, J., dissenting). The bill enacted by Congress applied to bank robbery and certain violent

crimes committed during a bank robbery. The bank robbery offense punished "[w]hoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank." Act of May 18, 1934, ch. 304, § 2a, 48 Stat. 783.

The 1934 statute left gaps in its protection of federal banks. Because the statute did not cover bank larceny, a person who stole money from a bank without force, violence, or "putting in fear" was immune from federal prosecution. In 1937, the Attorney General proposed amending the bank robbery statute to close that loophole. See H.R. Rep. No. 732, 75th Cong., 1st Sess. 1-2 (1937); *Bell*, 462 U.S. at 361; *Jerome*, 318 U.S. at 103. Congress ultimately passed a bill that prohibited bank larceny and bank burglary. The 1937 statute's larceny offense punished "whoever shall take and carry away, with intent to steal or purloin," property, money, or anything of value from a bank. Act of Aug. 24, 1937, ch. 747, 50 Stat. 749. The 1937 version of bank larceny is identical to the version presently codified in Section 2113(b) in all relevant respects.

In 1948, Congress codified the criminal code. Act of June 25, 1948, ch. 645, 62 Stat. 683. As part of that codification, Congress made several changes to the bank robbery offense. The principal statutory changes were the deletion of the term "feloniously" before the terms "takes" and "attempts" and the substitution of the term "intimidation" for "putting in

fear."[11] The Historical and Revision Notes (Reviser's Note) to Section 2113 are silent on the reason for removing the term "feloniously" from the bank robbery offense. The Reviser's Note stated, in language that mirrored the comprehensive House report accompanying the legislation, that "[n]ecessary minor translations of section references, and changes in phraseology, were made." See also H.R. Rep. No. 304, 80th Cong., 1st Sess. A135 (1947) (same language used by House Committee to explain change).

3. As the foregoing history demonstrates, the offenses in Section 2113(a) and (b) do not simply replicate their common law antecedents of robbery and larceny. The 1934 and 1937 statutes contained a mix of common law and modern terms. The common law mental element of larceny—"feloniously takes"—was incorporated into bank robbery in 1934 but eliminated in 1948. The mental element of bank larceny—"intent to steal or purloin"—"has no established meaning at common law." *Bell*, 462 U.S. at 360.[12]

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[11] The 1948 revision also amended the bank burglary offense by substituting the phrase "felony affecting such bank and in violation of any statute of the United States, or any larceny" for the term "felony or larceny." The Historical and Revision Notes (Reviser's Note) indicate that that change was intended to conform the statute to the Court's decision in *Jerome*, which held that the term "felony" in the bank burglary offense embraced only those offenses that are felonies under federal law affecting banks protected by the Act. See also H.R. Rep. No. 304, 80th Cong., 1st Sess. A135 (1947) (same).

[12] In *Turley*, 352 U.S. at 411-412, the Court noted that the term "steal[]" had no accepted common law meaning and was never equated with larceny. See *Factor* v. *Laubenheimer*, 290 U.S. 276, 303 (1933). Similarly, the term "purloin," which was not included in the common law definition of larceny (see *LeMasters* v. *United States*, 378 F.2d 262, 264 (9th Cir.

This Court has recognized that the 1934 and 1937 statutes contained elements that were broader than the common law. See *Bell*, 462 U.S. at 361 ("Section 2113(b) * * * goes well beyond even this expanded definition" of the common law crime of "larceny," and thus "the statutory language does not suggest that it covers only common-law larceny"). At common law, larceny was limited to thefts of tangible personal property. The statute, however, covers theft of "any property or money or any other thing of value." 18 U.S.C. 2113(a) and (b) (Supp. II 1996). Moreover, common law larceny required a theft from the possession of the owner. By contrast, the bank larceny statute applies when the property is in the "care, custody, control, management, or possession of, any bank." *Ibid.* Based on that broad language, *Bell* held that bank larceny in Section 2113(b) is not limited to common law larcenies. 462 U.S. at 360-361. For similar reasons, there is no sound basis for importing common law elements into Section 2113(a)'s robbery offense that Congress omitted from its text.

1967)), is virtually synonymous with "steal" and encompasses a broader range of theft offenses than common law larceny. See *United States* v. *Johnson*, 575 F.2d 678, 679-680 (8th Cir. 1978).

An "intent to steal" has a broader scope than the common law's intent to deprive the owner permanently of his property. An intent to steal includes the intent to deprive permanently or for an unreasonable length of time, or in such a way that the owner will thus be deprived of his property. See 2 W. LaFave & A. Scott, *supra*, § 8.5. By contrast, a person does not have a common law intent to steal if he intends to return the very property taken, and it is unclear whether it is a defense that he intended to return equivalent property. *Id.* §§ 8.5(a), 8.5(b), at 358-359, 359-362.

4. Petitioner contends (Br. 18-21) that the deletion of the term "feloniously" from the bank robbery statute in the 1948 codification was inadvertent and was not intended to delete the specific intent element from the offense of bank robbery. He maintains that that amendment was part of Congress's decision to delete most references to "felony" and "misdemeanor" from the Code because those terms were defined in Section 1 of Title 18. 18 U.S.C. 1 (1982).[13]

Petitioner's contention is incorrect. When Congress deleted the term "felony" or "misdemeanor" from a statute because of Section 1, the Reviser's Notes to the statute specifically explained that as the reason for the change. See, *e.g.*, Reviser's Note to 18 U.S.C. 751 ("References to offenses as felonies or misdemeanors were omitted in view of definitive section 1 of this title."), H.R. Rep. No. 304, *supra*, at A67 (same); Reviser's Note to 18 U.S.C. 550 ("Reference to felony * * * was omitted as unnecessary in view of definition of felony in section 1 of this title."), H.R. Rep. No. 304, *supra*, at A47 (same); Reviser's Note to 18 U.S.C. 2076 ("The reference to the offense as a misdemeanor was omitted as unnecessary in view of the definition of 'misdemeanor' in section 1 of this title."), H.R. Rep. No. 304, *supra*, at A134 (same); Reviser's Note to 18 U.S.C. 1951 ("Provisions designating offense as felony were omitted as

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[13] Congress codified those terms in one section because, before 1948, the lack of uniformity in statutory usages of "felony" and "misdemeanor" had caused courts to diverge when assessing whether a particular crime should be punished as a felony or a misdemeanor. See H.R. Rep. No. 304, *supra*, at A2-A4. Section 1 of Title 18 was repealed by Department of the Interior and Related Agencies Appropriation Act, Pub. L. No. 98-473, Tit. II, § 218(a)(1), 98 Stat. 2027.

unnecessary in view of definitive section 1 of this title."), H.R. Rep. No. 304, *supra*, at A131 (same). By contrast, the Reviser's Note to Section 2113(a) is silent on the reason for the deletion of "feloniously"; see also H.R. Rep. No. 304, *supra*, at A134-A135 (same). Thus, petitioner (Br. 18-21) has no basis for asserting that Section 1 was the reason Congress deleted "feloniously" from Section 2113(a).

The disputed deletion was not an isolated action. Congress also deleted the term "feloniously" before the term "takes" in the offense that proscribes a forceful taking within the special maritime and territorial jurisdiction of the United States under Section 2111. 18 U.S.C. 2111; see Act of Mar. 4, 1909, ch. 321, § 284, 35 Stat. 1144.[14] The Reviser's Note gives no reason for that deletion, stating only that "[m]inor changes were made in phraseology." See also H.R. Rep. No. 304, *supra*, at A134 (same). Nor is petitioner aided by the statement in the Reviser's Note that only changes "in phraseology" were made. Where Congress specifically deletes or omits an element of an offense from the statute, the change is substantive despite the Revisers' Notes to the contrary. See *Wells*, 117 S. Ct. at 930; *United States* v. *Lanier*, 117 S. Ct. 1219, 1226 n.6 (1997) ("The legislative intent of Congress is to be derived from the language and structure of the statute itself, if possible, not from the assertions of codifiers directly at odds with clear statutory language."). In short, the Reviser's Notes

[14] Section 2111 of Title 18 provides: "Whoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or by intimidation, takes from the person or presence of another anything of value, shall be imprisoned not more than fifteen years."

are not a basis for disregarding the plain language of Section 2113(a), which, unlike Section 2113(b), does not contain a specific intent requirement.

C. PRECEDENT AND CANONS OF STATUTORY INTERPRETATION DO NOT SUPPORT PETITIONER'S ARGUMENT

1. Petitioner contends (Br. 19-20) that *Prince* v. *United States*, 352 U.S. 322 (1957), indicates that bank robbery contains the same intent to steal element as bank larceny. That contention is mistaken. In *Prince* the Court held that Congress did not authorize cumulative punishment for convictions for bank robbery and entering the bank with intent to commit a felony, both of which are prohibited by Section 2113(a). The Court reasoned that Congress inserted the offense of unlawful bank entry into the statute in 1937 to reach a person who entered a bank to rob it but was able to obtain the bank's money without using force or intimidation, and it inserted larceny offenses for similar reasons. The Court stated that the statute could serve the purpose of reaching those acts without being read to create completely independent offenses. Thus, while it "was manifestly the purpose of Congress to establish lesser offenses" in drafting the statute, the Court found no indication that Congress intended to "pyramid" the penalties. *Id.* at 327.

The Court's statements that Congress created lesser offenses in the 1937 legislation and that the mental element of an intent to steal required for unlawful bank entry "merges" into the offense of bank robbery upon consummation of the robbery, 352 U.S. at 328, do not resolve the issue in this case. First, the "narrow" issue before the Court, *id.* at 325, was

whether the statute authorized cumulative punishment for the two offenses, and that was the only issue the Court resolved, *ibid.* Thus, even if this Court were to apply the holding of *Prince* to convictions obtained under the first paragraph of Section 2113(a) and Section 2113(b), such a holding would not compel a trial court to give an instruction for a lesser included offense if the government were to indict the defendant only for a violation of Section 2113(a). A proper application of *Prince* would require only that guilty verdicts under those two provisions be merged into one conviction.

Merger analysis is separate from the lesser offense issue presented here. Under this Court's cumulative punishment jurisprudence, the test is whether Congress intended to authorize *punishment* for the two crimes to be imposed cumulatively, a test that does not necessarily depend upon the elements of the crimes. See, *e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 11 (1978) (finding cumulative punishment barred for two offenses; but not reaching question whether offenses were greater and lesser offenses). If it so chooses, Congress can authorize cumulative punishment for a greater and lesser offense. Cf. *Missouri* v. *Hunter*, 459 U.S. 359, 368-369 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 340 (1981). Thus, it was not necessary for the Court in *Prince* to conclude that bank robbery had an intent-to-steal element to hold that cumulative punishment was barred for bank robbery and unlawful entry of a bank.

Second, although *Prince* remarked in passing that "the purpose of Congress [was] to establish lesser offenses," 352 U.S. at 327, the Court in that case did not analyze the lesser included offense issue by comparing the elements of each offense. This Court's

subsequent decision in *Schmuck* now requires that approach. Indeed, in conducting its analysis, the *Prince* Court did not even have before it a charge of Section 2113(b) bank larceny in the case. Thus, *Prince* does not establish that bank larceny is a lesser included offense of bank robbery.[15]

Finally, the essential holding of *Prince* is that Congress did not intend to pyramid punishments for unlawful bank entry and completed bank robbery; today that result would be achieved under the Sentencing Guidelines. Sentencing under the Guidelines generally takes account of the total course of a defendant's conduct and "groups" the related counts to prevent improper incremental punishment for closely related counts. See United States Sentencing

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[15] Nor does this Court's decision in *United States* v. *Gaddis*, 424 U.S. 544 (1976), support the conclusion that Section 2113(b) is a lesser included offense of bank robbery. In that case, the Court held that a defendant could not be separately convicted for both committing bank robbery in violation of Section 2113(a) and receiving the proceeds of a bank theft in violation of Section 2113(c). It also held that if a jury erroneously did so, the defendant would not be entitled to a new trial if the evidence supported the verdict as to conviction for the Section 2113(a) offense. *Id.* at 550. While *Gaddis* could be taken to imply that bank larceny is a lesser offense of bank robbery (since subsection (c) explicitly refers only to the larceny and not the robbery subsection), that is not a point that the Court explicitly made or on which it relied in its holding. *Gaddis* therefore simply prevents unintended multiple punishments under Section 2113; it does not express a view of greater and lesser offenses under that provision. Indeed, *Gaddis* relied on *Heflin* v. *United States*, 358 U.S. 415, 419 (1959), which had stated that "subsection (c) [of Section 2113] was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber." 424 U.S. at 547.

Comm'n *Guidelines Manual*, Ch. 3, Pt. D (1995). Thus, if a defendant in the position of petitioner were to be charged and convicted separately of Section 2113(a) bank robbery and Section 2113(b) bank larceny, the bank larceny conviction would have no effect on petitioner's length of incarceration. See *id.* § 2B3.1 (Robbery Guideline).

2. Petitioner also contends (Br. 18-19) that, under *Morissette*, *supra*, bank robbery must be presumed to contain a mental element despite Congress's failure to provide expressly for one during the codification of the statute in 1948. That proposition is correct, but it does not lead to the conclusion that the mental element in the first paragraph of Section 2113(a) is a specific intent to steal.

In *Morissette*, 342 U.S. at 276, the Court read the federal theft statute, 18 U.S.C. 641, to require proof of an intent to "deprive another of possession of property," despite the absence of such an element from the text of the statute. The Court reasoned that, at common law, larceny offenses had been construed to require such an element; accordingly, the Court should not construe the mere omission from the statute of that intent element as a conscious choice by Congress to eliminate it. 342 U.S. at 250-263. In analyzing the legislative history of Section 641, the Court noted that the statute was enacted as a consolidation of four former theft statutes and that the purpose of the 1948 consolidation was merely to place all theft crimes in a single statute. The Court stated that none of the previous crimes had been interpreted to be crimes without intention; nothing suggested that some were and some were not crimes of intention based on classification or punishment; none appeared to be a petty offense, nor was there an aim to com-

mingle strict liability crimes with crimes requiring intent in the statute. The Court found no "affirmative instruction" from Congress to eliminate intent from the offenses in the statute. *Id.* at 263-273.

The 1948 codification of the bank robbery statute differs in important respects from the history of Section 641. Congress's specific elimination of "feloniously" from the bank robbery section of the statute, while retaining the "intent to steal or purloin" element in the bank larceny section of the statute, showed an "affirmative instruction" to delete an intent to steal from the bank robbery statute. Congress is presumed to know the law when it legislates. See *Albernaz*, 450 U.S. at 341. It knew that it could follow the common law definition of robbery in the statute by simply using the word "rob" or "robbery" in defining the offense, because previous statutes using those terms had been interpreted as having incorporated the common law meaning of the offense. See *Harrison* v. *United States*, 163 U.S. 140, 142 (1896) (statute prohibiting robbery of the mails). Thus, Congress must be presumed to have understood that it was making a substantive change in the law when it deleted the term "feloniously" from the bank robbery statute.

3. The rule of lenity does not justify reading an "intent to steal" element into bank robbery. That rule "applies only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended." *Muscarello*, slip op. 14 (quotations omitted). Lenity thus requires a narrow construction of a statute when the statute contains a "grievous ambiguity or uncertainty." *Staples*, 511 U.S. at 619 n.17 (quoting *Chapman* v. *United States*, 500 U.S. 453, 463

(1991)). In this case, however, the plain language and the legislative history of Section 2113(a) demonstrate that the omission of an "intent to steal" element from bank robbery was deliberate. There is no "grievous ambiguity" in Section 2113(a); thus the rule of lenity is not applicable. See *Muscarello*, slip op. 14.

II. EVEN IF BANK LARCENY IS A LESSER INCLUDED OFFENSE OF BANK ROBBERY UNDER THE STATUTORY ELEMENTS TEST, THERE WAS NO ERROR IN THE CHARGE TO THE JURY

Federal Rule of Criminal Procedure 31(c) entitles a defendant to a lesser included offense instruction only if the evidence would permit a rational jury to convict him of the lesser offense while acquitting him of the greater one. *Keeble* v. *United States*, 412 U.S. 205, 208 (1973); *Stevenson* v. *United States*, 162 U.S. 313, 314-315 (1896). Thus, a factual dispute must exist as to an element of the greater offense that, if resolved in the defendant's favor, would still result in a conviction on the lesser offense. See *Sansone* v. *United States*, 380 U.S. 343, 350-351 (1965); see also 1 L. Sand et al., *Modern Federal Jury Instructions* ¶ 9.07, at 9-29. If there is no factual dispute, the court need not give a charge for the lesser included offense. See, *e.g.*, *United States* v. *Baker*, 985 F.2d 1248, 1259 (4th Cir. 1993), cert. denied, 510 U.S. 1040 (1994); *United States* v. *Payne*, 805 F.2d 1062, 1067 (D.C. Cir. 1986). Thus, in addition to *all* of the elements of the uncharged offense being encompassed within the charged offense and to having *fewer* elements than the charged offense, the evidence must support a conviction on the lesser, but not the greater, offense charged. See

Schmuck, 489 U.S. at 717 & n.9; *Sansone*, 380 U.S. at 350; *Berra* v. *United States*, 351 U.S. 131, 134 (1956).

The district court in this case properly concluded that no rational jury could find petitioner guilty of bank larceny without also concluding that he was guilty of bank robbery. J.A. 45. Petitioner's contrary claim, which the district court correctly rejected, rests on the assumption that a jury could find that he obtained funds from the banks with intent to steal them—and thus was guilty of bank larceny—without also finding that he used intimidation to obtain the money. Despite petitioner's attempt to solicit witness testimony that they could not "see" intimidation, the evidence showed that intimidation occurred.[16]

More importantly, as the district court properly concluded, no reasonable juror could find otherwise, as there was no evidence to suggest that the tellers handed petitioner thousands of dollars in bank money voluntarily and of their own free will, *i.e.*, without intimidation. Certainly there was no evidence that the tellers were petitioner's accomplices. J.A. 15, 45 ("Clearly, there is no basis to suggest that this money was taken with the compliance of these

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[16] Petitioner held up a sign in the first bank saying it was a "HOLD UP," and threw bait money back at the teller; in the second bank, he gestured to his coat in a way that suggested that he had a concealed gun. See pp. 2-3, *supra*. On such facts, other courts have upheld a finding of intimidation. See, *e.g.*, *United States* v. *Hopkins*, 703 F.2d 1102, 1103 (9th Cir.), cert. denied, 464 U.S. 963 (1983). Moreover, the evidence showed that both tellers were terrified. One lost control of her bladder, and both testified as to their fear. Pet. App. 36-37 (letter opinion of district court on defendant's motions for a new trial, for acquittal, and for downward departure at sentencing).

tellers."). Nor was there evidence that petitioner filled out a withdrawal slip or performed any other act that would cause a teller voluntarily to hand him cash. J.A. 10 ("This money certainly was not given to him because he was entitled to it and the money was certainly not given to him based upon the voluntary conduct of either of these tellers."). To the contrary, the evidence can support only one conclusion: Far from handing petitioner thousands of dollars voluntarily and of their own free will, the tellers handed petitioner the money he demanded because he took it "by intimidation" within the meaning of Section 2113(a). J.A. 10, 15, 45. Because no reasonable juror could reach the contrary conclusion, no bank larceny instruction was required, even if this Court were to conclude that bank larceny is a lesser included offense of bank robbery under the statutory elements test. *Ibid.*[17]

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[17] Because the same analysis will generally apply in bank robbery prosecutions, the question whether bank larceny is a lesser included offense of bank robbery would rarely affect the trials or results in bank robbery prosecutions. Cases in which bank robbery defendants are able to present plausible evidence that the tellers handed over money voluntarily, *i.e.*, without intimidation, are infrequent at best. It thus comes as no surprise that the vast majority of cases that even mention the issue presented in this case have upheld the trial court's refusal to give a bank larceny instruction on the ground that it is not supported by the evidence. See, *e.g.*, *United States* v. *Cornillie*, 92 F.3d 1108, 1109-1110 (11th Cir. 1996); *United States* v. *Sandles*, 80 F.3d 1145, 1147 n.1 (1996); *United States* v. *Walker*, 75 F.3d 178, 180-181 (4th Cir.), cert. denied, 517 U.S. 1250 (1996); *United States* v. *Lajoie*, 942 F.2d 699 (10th Cir.), cert. denied, 502 U.S. 919 (1991); see also *United States* v. *Perry*, 991 F.2d 304, 310-311 (1993) (declining to address the appellant's contention that bank larceny is a lesser included offense because no rational jury could find that the teller handed money to the defendant voluntarily).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 1998

APPENDIX

1. Federal Rule of Criminal Procedure 31(c) provides:

> **Conviction of Less Offense.** The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

2. Section 2113 of Title 18 provides:

> **Bank robbery and incidential crimes**
>
> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under

this title or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, including a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), and any institution the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the National Credit Union Administration Board, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the

District of Columbia, or any commonwealth, territory, or possession of the United States.

(h) As used in this section, the term "savings and loan association" means—

(1) a Federal savings association or State savings association (as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b))) having accounts insured by the Federal Deposit Insurance Corporation; and

(2) a corporation described in section 3(b)(1)(C) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)(C)) that is operating under the laws of the United States.

Supreme Court, U.S.
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No. 97-7213

In The

Supreme Court of the United States

October Term, 1997

SYLVESTER MOSLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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ARGUMENT

Respondent's brief makes this an easy case. Respondent admits, as it must, that larceny was a lesser included offense of robbery at common law, with both offenses requiring proof of the specific intent to steal. (Resp. Br. 22-23). Respondent also admits that, prior to the recodification of federal criminal statutes in 1948, the federal bank robbery prohibition included this same common law element of the specific intent to steal. (Resp. Br. 25) ("The common law mental element of larceny – 'feloniously takes' – was incorporated into bank robbery in 1934 but eliminated in 1948.") Finally, respondent admits that, under this Court's decision in *Morissette v. United States*, 342 U.S. 246 (1952), "bank robbery must be presumed to contain a mental element despite Congress's failure to provide expressly for one during the codification of the statute in 1948." (Resp. Br. at 32). The parties are on common ground on all three points. (*See* Pet. Br. 12-16, 17, 11-12). The dispute here thus reduces to a simple question – namely, in 1948, when Congress recodified the offense of bank robbery, did it eliminate the specific "intent to steal" element that had been part of the offense for the fourteen previous years? The answer, equally simple, is "No."

The text and history of 18 U.S.C. § 2113, viewed against the backdrop of undisputed common law principles, define bank larceny as a lesser included offense of bank robbery. Respondent offers nothing of substance to the contrary. First, as respondent admits, *Morissette* provides the proper method for analyzing the effect of the 1948 recodification on the bank robbery prohibition. The recodified federal bank statute, just like the recodified

theft statute at issue in *Morissette*, incorporates the intent to steal element from the common law, and respondent's efforts to diminish the force of *Morissette* are unpersuasive. Second, *Prince v. United States*, 352 U.S. 322 (1957), which explained the relationship between the robbery and unlawful entry offenses in § 2113, provides further support for the conclusion that bank robbery, like bank larceny, requires proof of the specific intent to steal. Third, *Bell v. United States*, 462 U.S. 356 (1983), does not, as respondent contends, cut the bank robbery and bank larceny prohibitions of § 2113 free from their common law moorings. Finally, respondent's remaining arguments either conflict with its own admission that *some* intent requirement must be implied for bank robbery (Resp. Br. at 16-17), or are makeweights. Respondent's tortured arguments only serve to distort beyond recognition this Court's jurisprudence.

1. This Court's decision in *Morissette* provides the proper method for analyzing the effects of the 1948 recodification of the federal criminal code on the bank robbery and bank larceny statutes at issue in this case.

In *Morissette*, the Court construed 18 U.S.C. § 641, a general prohibition on the theft of United States government property.[1] *Morissette* was indicted and convicted on

[1] Section 641 provides, as it did when *Morissette* was decided, as follows: "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another . . . any record, voucher, money, or thing of value of the United States or of any department or agency thereof . . . [s]hall be fined . . . or imprisoned. . . . " *Compare* 18 U.S.C. § 641 with *Morissette*, 342 U.S. at 248, n.2 (quoting § 641).

the charge that he "did unlawfully, wilfully and knowingly steal and convert" spent bomb casings belonging to the United States Government. 342 U.S. at 248. The core of his defense, rejected by both the trial court and the court of appeals, was that "he believed the casings were cast-off and abandoned, that he did not intend to steal the property," *id.*, and that § 641 required proof of an intent to steal, *id.* at 249-50. This Court, after careful review of the several statutes that were drawn together and recodified as § 641, concluded that, despite the trimming of specific intent terminology from the recodified statute, "[t]he history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Id.* at 269 n.28. Rejecting the government's contention that the offense of conversion under § 641 required proof only of general intent,[2] the Court turned to the common law as the touchstone for interpreting the statute:

> The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the

[2] "That the removal of [the spent casings] was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances." *Morissette*, 342 U.S. at 276 (emphasis in original).

> defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative. . . . [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, *absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.*

Id. at 263 (emphasis added). The Court thus drew on the common law to imply a specific rather than general intent element – the intent to steal – for a statute that, after recodification in 1948 (unlike before), was silent on the question of intent. Importantly, although Congress had dropped express requirements of felonious intent from the offenses recodified at § 641 (with Reviser's Notes stating that "[c]hanges were made in phraseology"), this Court nevertheless held that Congress had *not* given such "contrary direction" as would justify a break with the common law. *See id.* at 266 n.28. As petitioner has explained (Pet. Br. 8-26), the bank robbery prohibition in § 2113(a) underwent the very same change as § 641 in 1948, and the same result should obtain here as in *Morissette*.

In the face of *Morissette*, respondent grudgingly admits that "bank robbery must be presumed to contain a

mental element despite Congress's failure to provide expressly for one during the codification of the statute in 1948." (Resp. Br. 32). But, according to respondent, the specific intent element shared by common law robbery and common law larceny alike – the intent to steal – is *not* the mental element to imply for bank robbery. (Resp. Br. 32-33). Respondent seeks to justify this sharp departure from *Morissette* with the following purported "plain text" argument: by leaving the "intent to steal or purloin" element in the definition of bank larceny at the same time it deleted "feloniously" from the definition of bank robbery, Congress must have intended to convert bank robbery from a specific intent to a general intent crime. (Resp. Br. 33). This argument is seriously flawed. First, having already admitted that an element of the crime must be implied, respondent has placed the relevant interpretive questions beyond the grasp of "plain text" alone.[3] Second, respondent ignores the extent to which, even after recodification, the bank robbery and bank larceny provisions continue to adhere to the language of the common law. (*See* Pet. Br. 20-26). In short, respondent offers no principled basis for deciding the case at bar any differently from *Morissette*.

2. This Court's decision in *Prince* provides additional direct support for petitioner. (Pet. Br. 23-24). Respondent attacks petitioner's reliance on *Prince*, asserting that "the 'narrow' issue before the Court in [*Prince*] was whether the statute" at issue here, 18 U.S.C. § 2113, "authorized cumulative punishment for the two offenses [of bank robbery and unlawful entry], and that was the

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[3] *See also infra* at pp. 7-10, Point 4.

only issue the Court resolved." (Resp. Br. 30). This attack sidesteps the issue. Respondent recites the result in *Prince* correctly, but ignores its reasoning.

After analyzing the legislative history of § 2113, this Court concluded in *Prince* that an unlawful entry offense merges with a completed bank robbery, thus barring cumulative punishment for bank robbery and unlawful entry convictions. 352 U.S. at 325-29. Central to the Court's conclusion was the premise that both unlawful entry and bank robbery share the *same* specific intent to steal:

> The gravamen of the [unlawful entry] offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather *the heart of the crime is the intent to steal. This mental element merges into the completed crime* if the robbery is consummated.

Id. at 328 (emphasis added) (footnote omitted). As petitioner has explained, the Court's reasoning in *Prince* makes sense only if bank robbery, like unlawful entry of a bank, has at its heart the specific intent to steal. (Pet. Br. 24). Respondent does not, and cannot, refute this basic point.

3. The decision in *Bell* does not, as respondent contends, cut § 2113 off from its common law roots. (Resp. Br. 26). As petitioner has explained (Pet. Br. 24 n.11), this Court held in *Bell* that the government can satisfy the "takes and carries away" element of bank larceny with proof that a defendant took the bank's property by false pretenses, 462 U.S. at 360, a manner of taking property that fell outside the scope of the "takes" element of

common law larceny, *id.* at 359. It is equally clear, however, that this Court left the "takes and carries away" element itself intact; as the Court was careful to state, § 2113(b) "does *not* apply to a case of false pretenses in which there is not a taking and carrying away."[4] *Id.* at 361 (emphasis added). In this case, in sharp contrast to *Bell*, respondent seeks *not* to broaden the manner of proving the specific intent element of bank robbery, but rather seeks to eliminate the specific intent element from bank robbery altogether. Neither *Bell* nor any other decision of this Court supports such a result, and *Morissette* requires the conclusion urged by petitioner.

4. Respondent contends that the plain text of the bank robbery and bank larceny provisions of 18 U.S.C. § 2113 easily disposes of the "lesser included offense" issue here. (Resp. Br. 12-16). The core of respondent's argument is that, "[w]hile bank larceny contains an express 'intent to steal or purloin' element, bank robbery has no such mental element in its text." (Resp. Br. at 12). However, respondent deprives its "plain text" argument of what little force it may have in the very next breath by asserting that it is perfectly appropriate to *imply* a *general*

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[4] As petitioner has explained (Pet. Br. 24 n.11), and as this Court's recent decision in *Evans v. United States*, 504 U.S. 255 (1992), demonstrates, there is nothing incongruous in concluding that one aspect of a federal criminal offense has been broadened from its common law confines, while another aspect of the very same offense continues to hew to the common law definition of that offense. *Id.* at 263-64 ("Although the present statutory text is much broader than the common-law definition of extortion . . . the portion of the statute that refers to official misconduct continues to mirror the common-law definition.") (construing Hobbs Act, 18 U.S.C. § 1951).

intent element into the bank robbery statute.[5] (Resp. Br. 16). According to respondent,

> [a]lthough bank robbery has no specific intent to steal element, that does not mean that it lacks a mental element altogether. The "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." There is a presumption that any federal criminal offense requires a mental element. Accordingly, this Court has read a mental element into a criminal statute even where the statute did not expressly provide for one.

(Resp. Br. 16) (citations omitted) (quoting and citing, *inter alia, Staples v. United States*, 511 U.S. 600 (1994)).[6] But respondent cannot have it both ways. If, as respondent admits, this Court's federal criminal jurisprudence makes it proper to imply an intent element of some kind into the bank robbery statute, then the plain text alone of the bank robbery and bank larceny provisions *cannot*, as respondent argues elsewhere, provide the answer to the "lesser included offense" question in this case.

In any event, the authorities cited by petitioner and respondent alike make it clear that the bank robbery statute cannot be taken to define a strict liability offense, and that *some* intent element must therefore be implied in the statute. One question remains: *which* intent element should be implied, general intent or the specific intent to

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[5] Respondent thus tacitly concedes the absurdity in holding, as the Third Circuit appears to have done, that bank robbery is a strict liability offense. (*See* Pet. Br. 10-11 and n.5).

[6] Petitioner has, of course, made the very same points. (Pet Br. 8-11) (discussing *Staples*).

steal? By relying on the text, the common law and the statutory history of § 2113, as well as cases such as *Morissette* and *Prince*, petitioner has identified – on a principled basis – the specific intent to steal as the *mens rea* that Congress chose for the offense of bank robbery.

Respondent, by contrast, contends that general intent is the proper choice. For support, respondent cites "diminished capacity" cases from the courts of appeals. (Resp. Br. 16-17 and n.8). Not one of the cases on which respondent relies, however, determined the requisite intent for bank robbery by analyzing the common law antecedents and statutory history of § 2113, as *Morissette* requires. Instead, these cases relied on the superficial contrast between the plain text (which respondent concedes is inadequate in this instance) definitions of bank robbery, unlawful entry and bank larceny and thus provide little, if any, support for respondent. *See, e.g., United States v. Johnston*, 543 F.2d 55, 58 (8th Cir. 1976) ("A simple comparison of the language in the two paragraphs of § 2113(a) convinces us that Congress chose to define the second paragraph in terms of specific intent and consciously did not include language of specific intent in the first paragraph."); *United States v. DeLeo*, 422 F.2d 487, 490-91 (1st Cir. 1970) (same). Respondent also offers a jumble of policies generally related to robbery as a basis for implying a general intent element in the bank robbery statute. (Pet. Br. 17-19). These policy arguments, which are in no way anchored in the statutory text or the common law, should be rejected.

The other statutory construction cases that respondent cites do not support its position. For example, in *Bates v. United States*, this Court held that the "specific

intent to injure or defraud someone, whether the United States or another, is not an element of the misapplication of [student loan] funds proscribed by" 20 U.S.C. § 1097(a). 118 S. Ct. 285, 288 (1997). In so holding, this Court contrasted 20 U.S.C. § 1097(a) against both § 1097(d)'s express "intent to defraud" element and 18 U.S.C. § 656's prohibition on the willful misapplication of bank funds, stating that §"1097(a) *never* contained, as § 656 did, an 'intent to defraud' requirement, a requirement present from the start and still contained in § 1097(d)." *Id.* at 290. As respondent admits (Resp. Br. 25), the bank robbery statute, unlike the statute at issue in *Bates*, *did* contain a specific intent element, at least until 1948. *Bates* is simply inapposite.

In *United States v. Shabani*, this Court held that the drug conspiracy provision at 21 U.S.C. § 846 does not require the government to prove an overt act in furtherance of the conspiracy, 513 U.S. 10, 11 (1994). In so holding, the Court followed the common law definition of conspiracy rather than implying an overt act requirement into § 846, the text of which is silent on the point. *Id.* at 13-14 ("[A]bsent contrary indications, Congress intends to adopt the common law definition of statutory terms. We have consistently held that the common law understanding of conspiracy does not make the doing of any act other than the act of conspiring a condition of liability") (internal quotations omitted) (citations omitted). Similarly, in *United States v. Wells*, the Court declined to imply a materiality element into the false statement prohibition of 18 U.S.C. § 1014 because, among other things, the defendants did not "come close to showing that at common law the term 'false statement'

acquired any implication of materiality that came with it into § 1014." 117 S. Ct. 921, 927 (1997). In the case at bar, by contrast, the common law definitions of the offenses at issue – robbery and larceny – support the conclusion that a specific intent element should be implied in the definition of bank robbery provided in 18 U.S.C. § 2113(a). *Shabani* and *Wells*, like *Bates*, are inapposite.

Finally, respondent also cites a host of other federal anti-robbery statutes, some of which purportedly require proof of specific intent (Resp. Br. 15 n.7), and some of which purportedly do not (Resp. Br. 14-15). At best, these statutes show that Congress has used a variety of verbal formulas to incorporate one or more of the common law elements of robbery into a variety of criminal statutes. Respondent's argument does not answer the question here, which is whether, despite seeming congressional silence, § 2113(a) like § 2113(b), requires proof of the specific intent to steal.

5. Respondent, making another "plain text" argument, points to a purported difference between the bank robbery provision's "takes" element, 18 U.S.C. § 2113(a), and the bank larceny provision's "takes and carries away" element, 18 U.S.C. § 2113(b). (Resp. Br. 19-20). According to respondent, this textual difference shows that bank larceny has a "carries away" element that bank robbery lacks. However, this textual difference between the bank robbery and bank larceny provisions hews to the language of the common law and thus supports petitioner, not respondent.

First, as respondent admits, the "carries away" portion of the bank larceny statute is rooted in the common

law's "asportation" requirement. (Resp. Br. 20, 22). Congress thus used common law language – and, by inference, common law meaning – to define bank larceny. *See Evans v. United States*, 504 U.S. 255, 259 (1992); *Morissette*, 342 U.S. at 263. Second, as respondent itself notes, common law robbery, which plainly shared common law larceny's asportation requirement, "was often defined in simple and undetailed language" that makes *no* mention of asportation, "such as the 'felonious and violent taking of goods or money from the person of another by force or intimidation.' " (Resp. Br. 22) (quoting 2 LaFave & Scott, *Substantive Criminal Law* § 8.11 n.6 (1986)). Indeed, as LaFave and Scott observe, "American statutes do not generally spell out the eight elements [of robbery]; they define the crime of robbery in different ways, often in the somewhat undetailed language used by Blackstone, Hawkins, Hale and East in defining common law robbery." 2 LaFave & Scott, *Substantive Criminal Law* § 8.11 n.6. Section 2113(a) simply conforms to this feature of American robbery statutes. (See also Pet. Br. 12-13 and n.8) (providing common law formulations of robbery and larceny). Congress thus followed common law usage just as closely by leaving "carries away" implicit for bank robbery as it did by making "carries away" explicit for bank larceny. Common law meaning thereby follows.

6. Respondent's contention that bank larceny, unlike bank robbery, requires proof of a specific monetary value for the stolen property (see Resp. Br. 21) is a makeweight and should be rejected. The bank larceny statute prescribes two degrees of punishment in two separate paragraphs, the severity of the punishment depending upon the value of the property taken from the bank.

Where the value exceeds $1,000, punishment can include imprisonment for up to ten years, but where the value does not exceed $1,000, punishment cannot exceed one year. *Compare* 18 U.S.C. § 2113(b), first paragraph *with* 18 U.S.C. § 2113(b), second paragraph. Respondent, for its part, expressly notes this very feature of section 2113(b). (Resp. Br. 10 n.2).

In a bank larceny prosecution, the *only* function served by proof of the precise monetary value of the stolen property (as opposed to proof that the property has some value greater than $0) is to distinguish between the two levels of punishment provided in § 2113(b). However, with respect to the basic theft element – that one be shown to have taken "any property or money or any other thing of value" – the bank robbery and bank larceny provisions are *identical*. *Compare* 18 U.S.C. § 2113(a), (b) (first paragraph) *with* (b) (second paragraph). In other words, it could scarcely be more plain that the differing degrees of punishment for bank larceny do not constitute a separate element that distinguishes bank larceny from bank robbery. *See Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1229-30 (1998) (a sentencing factor is not an element of the crime); *United States v. Belt*, 516 F.2d 873, 875 (8th Cir.) ("The element of value in [18 U.S.C.] § 661 establishes the degree of the larceny committed for purposes of prescribing punishment; it is not an essential element of the [offense]."), *cert. denied*, 423 U.S. 1056 (1975). Indeed, the Third Circuit recognized as much in its decision in this case. (J.A. 46 n.2).

The Model Jury Instructions provide additional support for this reading of the statute. The model charge on the elements of bank larceny *does not* include value of the

property taken as an element of the offense. 3 Leonard B. Sand et al., *Modern Federal Jury Instructions* ¶ 53-16, at 53-42 (1998). That instruction reads:

> In order to prove this charge against the defendant, the government must establish, beyond a reasonable doubt, each of the following three elements of the offense:
>
> 1. That on or about [date in question], the [name of bank, savings & loan, or credit union] was a bank (*or* savings & loan, *or* credit union), the deposits of which were insured by the Federal Deposit Insurance Corporation (*or* the Federal Savings & Loan Insurance Corporation *or* the National Credit Union Administration);
>
> 2. That the defendant took and carried away money which had been in the possession or care of the bank; and
>
> 3. That the defendant intentionally took the money knowing that he was not entitled to it.

If a jury finds all three elements of the offense, only then is property value considered for penalty purposes. The judge charges that "[i]f, after careful consideration of all of the evidence, you find that the government has proven each of the three elements that I have just described beyond a reasonable doubt, then you must determine the value of the property that the defendant took." *Id.* ¶ 53-23, at 53-54. Simply stated, value "should be considered by the jury only after they have determined that the defendant is guilty of some type of bank larceny within the meaning of section 2113(b)." *Id.* Comment ¶ 53-23, at 53-55. Therefore, § 2113(b) does not create separate offenses for larcenies involving property of varying

values. It uses, however, property value as a factor that affects the offender's penalty.

7. Petitioner has demonstrated that, applying the traditional rules of statutory construction for federal criminal statutes, bank larceny is plainly a lesser included offense of bank robbery. Respondent, unprompted by petitioner, is at pains to urge that the rule of lenity does not apply in this case. (Resp. Br. 33-34). Petitioner agrees, in the sense that the traditional rules of statutory construction, properly applied to the text and history of 18 U.S.C. § 2113, appear adequate to eliminate any doubt regarding the status of bank larceny as a lesser included offense of bank robbery. *See Reno v. Koray*, 515 U.S. 50, 65 (1995) ("The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended.") (internal quotations omitted) (citations omitted). If, however, this Court concludes that it can only guess at the intended effect of the 1948 recodification on the specific "intent to steal" element that respondent admits (Resp. Br. 25) was part of the pre-1948 bank robbery statute, then this "ambiguity concerning the ambit of [bank robbery] should be resolved in favor of lenity," *Rewis v. United States*, 401 U.S 808, 812 (1971), *i.e.*, a specific "intent to steal" element for bank robbery.

8. Respondent, recycling an argument already pressed in its opposition to certiorari (*see* Opp. Br. 5-7), urges that this case can be resolved on evidentiary grounds and that the Court need not reach the legal question whether bank larceny is a lesser included offense of bank robbery. (Resp. Br. 34-36). This is incorrect.

The district court's decision to refuse the requested "lesser included offense" instruction on bank larceny, based on its view of the evidence in this case, is not before this Court. The Third Circuit expressly declined to review the district court's analysis of whether the evidence would support a bank larceny instruction.[7] (J.A. 45). Instead, the Third Circuit, acknowledging a split among the circuits, held that as a matter of law bank larceny can *never* be a lesser included offense of bank robbery and affirmed the district court judgment on that basis. (J.A. 46-52). This Court granted review to decide the legal question whether bank larceny is a lesser included offense of bank robbery, and that question is properly presented in this case.

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[7] The evidence *did* support the requested "lesser included offense" instruction on bank larceny. (See Pet. Br. 3-4).

CONCLUSION

For the foregoing reasons, Mr. Mosley respectfully requests that the judgment of the Third Circuit be reversed and the case be remanded for further proceedings.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SYLVESTER MOSLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari in the
United States Court of Appeals
for the Third Circuit

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I. INTEREST OF THE AMICUS CURIAE

The Association of Criminal Defense Lawyers of New Jersey has a membership of approximately 550 members who practice criminal defense throughout the State of New Jersey. Many of our members appear regularly, if not exclusively, before the United States District Court. The pending writ raises an important question on the parameters of Federal Rule of Criminal Procedure 31(c) regarding the limitations of a lesser included offense and the structure of Title 18 United States Code § 2113 defining bank robbery and its incidental crimes. This Association chooses very carefully the cases in which it seeks to appear as amicus curiae. It is the belief of the Association that the instant issue is crucial to the rights of criminal defendants and to the fair administration of justice.[1]

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1. Neither counsel for the respective parties authored this brief in whole or in part and no person or entity, other than the amicus curiae, made any monetary contribution to the preparation or submission of this brief.

II. SUMMARY OF ARGUMENT

The elements of the crime of bank larceny embodied in Title 18 United States Code § 2113(b) are a subset of the elements of the bank robbery statute of Title 18 United States Code § 2113(a). The bank larceny statute does not require any additional element than the bank robbery crime. Therefore, precedent from this Court makes clear that bank larceny is a lesser included offense of bank robbery and an instruction for larceny should have been offered the jury in this matter pursuant to Federal Rule of Criminal Procedure 31(c).

A comparison of the two statutes makes clear that the only difference between bank robbery and bank larceny is the use of force and violence or intimidation in the robbery context. Of course, the Court below found that the larceny provision had an "intent to steal or purloin" element that was missing in the robbery statute. It is true that a plain reading of the robbery statute does not show such an intent phrase. But it is evident from a review of the common law and the legislative history of both provisions that such intent can be plainly inferred. The historical requirements of the two crimes and the manner in which Congress formulated them evidence such an intent element in bank robbery.

Landmark cases from this Court lend support to this position. In Morissette v. United States, 342 U.S. 246 (1952) this Court reviewed common law and legislative history in determining that the theft statute of Title 18 United States Code § 641 had an inferred felonious intent element. A review of the common law and legislative history of Title 18 United States Code § 2113 was undertaken by this Court in Prince v. United States, 352 U.S. 322 (1957). When this Court engaged in a comparison of the elements of bank robbery and entering a bank to commit a felony, the conclusion was that the intent to steal element of the entering crime "merges into the completed crime if the robbery is consummated." Id. at 328. These cases indicate that an intent to steal element can be inferred in the bank robbery provision of Title 18 United States Code § 2113(a).

Bank larceny should be considered a lesser-included offense of bank robbery.

III. ARGUMENT

THE BANK LARCENY PROVISION OF TITLE 18 UNITED STATES CODE § 2113(b) IS A LESSER-INCLUDED OFFENSE OF THE CRIME OF BANK ROBBERY IN § 2113(a) PURSUANT TO THE TEXTUAL ELEMENTS TEST.

Federal Rule of Criminal Procedure 31(c) allows for a defendant to "be found guilty of an offense necessarily included in the offense charged." Such provision enables a jury to have a less serious alternative when the jury suspects the defendant guilty of some offense, but is uncertain about the proofs regarding the charged offense. This Court noted in Spaziano v. Florida, 468 U.S. 447, 455 (1984) that the "absence of a lesser included offense instruction increases the risk that the jury will convict simply to avoid setting the defendant free." The instant matter may have realized such an unfair result by not offering the jury the opportunity to consider the lesser-included offense of bank larceny, rather than simply the charged offense of bank robbery. The elements test enunciated in Schmuck v. United States, 489 U.S. 705 (1989) is clearly satisfied when analyzing the respective provisions of bank robbery in Title 18 United States Code § 2113(a) and bank larceny in § 2113(b). Therefore, it was error for the

District Court to refuse to offer the jury the alternative and lesser-included offense of bank larceny.

This Court in Schmuck announced a clear approach in applying Federal Rule of Criminal Procedure 31(c):

> . . . one offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).

Id. at 716. This Court drew support for the elements test from the language of Rule 31(c) which suggests that the comparison of offenses should be "conducted by reference to the statutory elements of the offenses in question . . ." Id. at 716. Such an approach "involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial." Id. at 720. The elements test also promotes judicial economy because appellate review can be conducted without the need for the entire evidentiary record. Id. at 720-721.

A lesser-included instruction is only proper when the greater offense charged requires the jury to find a disputed factual element which need not be shown for conviction of the lesser-included offense. Keeble v. United States, 412 U.S. 205, 208 (1973). Clearly, a review of the provisions of § 2113(a) and (b) suggests that the greater offense of bank robbery contains an element of force or intimidation that does not exist for the crime of bank larceny. The position taken by the Third Circuit below in United States v. Mosley, 126 F.3d 200 (3d Cir. 1997) incorrectly suggests that bank larceny is not a lesser-included offense of bank robbery because larceny requires an element of "intent to steal or purloin" that is not required for bank robbery. Id. at 204. Essentially, the Third Circuit believed that the intent to steal element was irrelevant for bank robbery purposes because "the crime is his resort to force and violence, or intimidation, in the presence of another person to accomplish his purposes" quoting from United States v. Brown, 547 F.2d 36, 39 (3d Cir. 1976). The Mosley Court took support for its position from the Tenth Circuit in United States v. Brittain, 41 F.3d 1409 (10th Cir. 1994) which found no indication in the legislative history that Congress intended § 2113(a) to contain an "intent to steal" element identical to § 2113(b). 41 F.3d at 1413.

Clearly, such rationale for not finding bank larceny a lesser-included offense of bank robbery is faulty. While it is correct that the essence of bank robbery is the person's resort to force or intimidation, it must also be recognized that such action must be undertaken with the intent to take from the person or presence of another something of value. Robbery can be viewed as larceny from the person plus force or intimidation. The legislative history argument also fails to recognize some basic facts. When Congress added the bank larceny provision in 1937 to support the bank robbery statute passed three years earlier, it explicitly titled the Act "To amend the bank - robbery statute to include burglary and larceny." Act of Aug. 24, 1937, ch. 747, 50 Stat 749. Such title suggests that Congress was viewing this new larceny provision as being included within the parameters of the robbery statute. Likewise, the present heading given by Congress in § 2113 provides some further insight into the legislative thinking - "Bank robbery and incidental crimes".

The original bank robbery statute passed in 1934 was codified in Title 12 United States Code § 588(b) and explicitly required that a conviction could only result if a person "feloniously takes, or feloniously attempts to take . . ." Such requirement was not altered in any way when the robbery statute was amended in 1937 to include the larceny offense within

the same section. However, when the federal criminal code was revised and codified in 1948, the provisions were altered somewhat. The "feloniously" phrase was deleted from the robbery crime and the larceny offense was given its own section, such that robbery and larceny were respectively codified at Title 18 United States Code § 2113(a) and (b).

Apparently, the Third Circuit in Mosley notes the deletion of the term "feloniously" as "support for the proposition that intent was not conceived as an element of the crime" because Congress failed "to give some indication that intent was to remain an element of bank robbery." 126 F.3d at 205. Such rationale seems misplaced when this Court's decision in Prince v. United States, 352 U.S. 322 (1957) is considered. This Court reviewed the legislative history of bank robbery in 18 U.S.C. § 2113(a) and explained:

> . . . The statute in its present form was enacted by the June 1948 revision . . . The legislative history indicates that no substantial change was made in the revision. It segregated the larceny provision in § 2113(b), leaving robbery and unlawful entry in § 2113(a).

352 U.S. at 326 n. 5. Such deletion of the term "feloniously" was not deemed by this Court to be a "substantial change" because the element of an intent to steal can clearly be inferred. The Third Circuit below even recognized that the deletion of "feloniously" was "a result of Congress' effort to delete references to felonies and misdemeanors from the code, inasmuch as both terms were defined in 18 U.S.C. § 1 (repealed)." 126 F.3d at 205.

This Court spoke eloquently regarding the inference of intent in criminal statutes in the landmark case of Morissette v. United States, 342 U.S. 246 (1952). Though the case may have begun as "profoundly insignificant" it resulted in answering questions "both fundamental and far-reaching in federal criminal law." Id. at 247. Though the defense had argued that the taking of spent bomb casings from federal property required felonious intent, the trial court had ruled that the provision for theft codified in 18 U.S.C § 641 required no element of criminal intent. However, this Court found such element of intent inferred:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as unequivocal and persistent in mature systems of law as

> belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

342 U.S. at 250. The crimes of stealing and larceny and its variants were viewed as among the earliest offenses known to the law that existed before legislation and that :

> Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act.

342 U.S. at 262. This Court in Morissette held that the mere omission from the explicit language of § 641 of any intent element could not be construed as the elimination of that element:

> . . . where Congress borrows terms of art in which are accumulated the legal

> tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

342 U.S. at 263. The Court noted that its attention had not been directed to "any instance in which Congress has expressly eliminated the mental element from a crime taken over from the common law." Id. at 265.

Congress did not expressly eliminate the mental elements of intent in the bank robbery provision of 18 U.S.C. § 2113(a). When it initially enacted the robbery statute in 1934, Congress included the term "feloniously." The term remained when larceny was included in the robbery provision in 1937. When Congress revised and codified the federal criminal statutes in 1948, the term "feloniously" was removed. Such deletion was undertaken to remove the countless references to"felonies" and "misdemeanors" that had previously existed in the criminal code. It was not done to radically change the crime of robbery from that generally accepted from common law. This Court in Prince and Morissette seemingly support that view.

Prince v. United States, 352 U.S. 322 (1957) involved an individual charged and convicted of bank robbery and also the entering of a bank with the intent to commit a felony. A sentence of twenty years was imposed on the bank robbery and fifteen years given for the entering of the bank to be served consecutively. This Court held that such sentence was illegal and that the defendant should be sentenced only on the bank robbery charge. The Prince Court believed that § 2113 "creates and defines several crimes incidental to and related to thefts from banks organized or insured under federal laws." Id. at 323. The 1937 amendment to the statute was apparently proposed by the Attorney General in a letter to Congress:

> The only factor stressed by the Attorney General in his letter to Congress was the possibility that a thief might not commit all the elements of the crime of robbery. It was manifestly the purpose of Congress to establish lesser offenses. But in doing so there was no indication that Congress intended also to pyramid the penalties.

352 U.S. at 327. This Court engaged in an elements test of bank robbery and entering a bank to commit a felony and concluded that the heart of the crime of

entering a bank to commit a crime is the intent to steal and that such "mental element merges into the completed crime if the robbery is consummated." Id. at 328. What better indication can be offered to show that this Court has previously opined that the crime of bank robbery has an intent to steal embodied in it?

Further analysis of the bank robbery statute was offered by this Court in Heflin v. United States, 358 U.S. 415 (1959) when § 2113(c) was deemed to have been designed to provide punishment for those who receive the money from the robbery and not to increase the punishment for the individual who actually robbed the bank. Support for such view was obtained from the Senate Report on the Act which had been captioned "Punishment for Receivers of Loot From Bank Robbers." Similar support for the instant petitioner's claim can be had from the caption of the 1937 Act creating the bank larceny offense - "An Act to amend the bank - robbery statute to include burglary and larceny." The procedural history of the Heflin matter had begun when the District Court had given consecutive sentences for violations of § 2113(a), (b), (c), (d) and conspiracy to violate the above sections and the Fifth Circuit reversed for resentencing. See Heflin v. United States, 223 F.2d 371 (5th Cir. 1955). The Fifth Circuit believed that " . . 18 U.S.C.A. § 2113 (a), (b), and (d) have been construed not as creating separate offenses, but only

as creating different maximum punishments for a single offense depending on the existence of aggravating circumstances." Id. at 376. The violations of § 2113(a) and § 2113(b) became merged into the conviction under § 2113(d).

More recently, in Rutledge v. United States, 116 S. Ct. 1241 (1996) this Court looked to common law to explain that where two statutory provisions proscribe the same offense, it can be presumed that the legislature did not intend to impose two punishments for that offense. The District Court had imposed concurrent life sentences for drug conspiracy in violation of 21 U.S.C. § 846 and for engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848, as well as a $50 special assessment on each count. But this Court concluded that the "in concert" element of a § 848 offense "necessarily includes a finding that the defendant also participated in a conspiracy violative of § 846; conspiracy is therefore a lesser included offense of CCE." Id. at 1250. The same argument holds true in the instant matter. A finding of guilt on bank robbery necessarily includes a finding that the person participated in a larceny of a bank.

Most of the federal Circuit Courts that have considered this issue agree with the petitioner. The Fourth Circuit has consistently supported the

petitioner's position. In United States v. Carter, 540 F.2d 753 (4th Cir. 1976) the Court explained that

> Bank robbery and bank larceny are very similar crimes. Larceny, in fact, is generally regarded as necessarily included offense in the crime of robbery ' . . . It is impossible to commit robbery without having first committed larceny'.

540 F.2d at 754(citations omitted). The Circuit reversed and remanded the defendant's bank robbery conviction based on the District Court's failure to instruct the jury on the lesser-included offense of bank larceny. Later, in United States v. Amos, 566 F.2d 899 (4th Cir. 1977) the Court held that a bank larceny conviction merges into a bank robbery conviction because a conviction for a less aggravating form of bank theft merges into a conviction for a more aggravating form of bank robbery. More recently, in United States v. Walker, 75 F.3d 178 (4th Cir. 1996) the Court reaffirmed its view that bank larceny is a lesser-included offense of bank robbery by concluding that the element distinguishing the crimes is the use of force and violence or intimidation to complete the crime. Such view is shared by the Eighth Circuit in

United States v. Cady, 495 F.2d 742, 748 (8th Cir. 1974) when the Court explained that the "difference between the proof of robbery (subsection (a)) and larceny (subsection (b)) is in the taking by force and violence, or by intimidation required in the case of robbery." United States v. Cornillie, 92 F.3d 1108, 1109 (11th Cir. 1996) and United States v. Sandles, 80 F.3d 1145 (7th Cir. 1996) also stand for the proposition that bank larceny only lacks the essential elements of force or intimidation to be a robbery. See also United States v. Perry, 991 F.2d 304, 311 (6th Cir. 1993) and United States v. Henson, 945 F.2d 430, 440 (lst Cir. 1991). In a case interpreting the District of Columbia criminal code, Walker v. United States, 418 F.2d 1116 (D.C. Cir. 1969) indicated that larceny is a lesser included offense of robbery.

The Third Circuit below cites United States v. Gregory, 891 F.2d 732 (9th Cir. 1989) to rebut the weight of authority. The Ninth Circuit looks at the respective statutes and finds that bank larceny is not necessarily included as a lesser offense in bank robbery because larceny "contains specific intent element which need not be proved in the bank robbery context." Id. at 734. No further analysis is offered by the Court. Significantly, the Court below looked to the analysis of the Tenth Circuit in United States v. Brittain, 41 F.3d 1409 (10th Cir. 1994) for support even though precedent from the Circuit ultimately

requires the Brittain panel to find that bank larceny is a lesser-included offense of bank robbery.

The rationale offered by the Court below in reliance on the Brittain case shows the faulty analysis. Initially, the Brittain Court looked to the plain language of § 2113(a) and (b) and obviously observes that the bank robbery provisions of §2113(a) contains no language like "with intent to steal or purloin." Id. at 1413. Then, the Court states that there is nothing in the legislative history to specifically indicate that Congress intended § 2113(a) to contain an 'intent to steal' element identical to § 2113(b), but proceeds to offer analysis to seemingly rebut such position. Id. at 1413-1414. It notes that "the fact that robbery and larceny were offenses at common law, it might be argued that Congress intended to incorporate into § 2113 the intent element required for the offenses at common law." Id. at 1413. The Tenth Circuit also recognized that the term "feloniously" that was contained in the first two forms of the bank robbery statute in 1934 and 1937 "could have been interpreted as requiring an intent to steal; Courts have often construed the phrase 'felonious taking' in robbery statutes in such a fashion." Id. at 1413. Further, the Brittain Court must concede that:

> it seems likely that the deletion of 'feloniously' was simply a result of

> Congress' effort to remove references to felonies and misdemeanors from the code; such terms were considered redundant in light of a specific definition of those terms provided in 18 U.S.C. § 1.

41 F.3d at 1414. Such analysis of the legislative history seems to support the argument that Congress intended an intent to steal element in the bank robbery statute. Substantial reliance by the Court below on such a case shows the weakness of the position taken by the Third Circuit.

It seems clear that the petitioner was denied his right to a fair trial in the instant matter by the District Court's refusal to instruct the jury on the lesser included offense of bank larceny. The dictates of Federal Rule of Criminal Procedure 31(c) were not followed.

IV. CONCLUSION

It is respectfully requested that the judgment in the instant matter be reversed and the matter be remanded to the District Court for the purpose of a new trial.

Respectfully submitted,

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(9)

Supreme Court, U.S.
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No. 97-7213

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SYLVESTER MOSLEY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the
United States Court of Appeals
For the Third Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Interest of *Amicus Curiae*

Founded in 1958, the National Association of Criminal Defense Lawyers is one of the nation's leading organizations advancing the mission of criminal defense lawyers to ensure justice and due process for persons accused and convicted of crime. NACDL's mission, as defined in its bylaws, is to "[e]nsure justice and due process for persons accused of crime . . . [f]oster the integrity, independence and expertise of the criminal defense profession . . . and [p]romote the proper and fair administration of justice". NACDL has almost 10,000 members nationwide – along with 80 state and local affiliate organizations representing another 28,000 members – including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL has appeared before this Court

on many occasions as *amicus curiae*. See e.g., Trest v. Cain, 66 U.S.L.W. 4023 (1997).[1]

SUMMARY OF THE ARGUMENT

The National Association of Criminal Defense Lawyers ("NACDL") files this *amicus* petition on behalf of Petitioner, Sylvester Mosley. At issue is whether the crime of larceny is a lesser included offense of the crime of robbery. The Third Circuit determined that larceny was not an included offense of the crime of robbery, and in so ruling, stands in the stark minority of the many courts addressing this issue. If the ruling is permitted to stand, the outcome of a defendant's case may well rise and fall on the accident of geography. If the indictment is filed virtually anywhere else in the United States, the jury would be instructed that larceny is a lesser-included offense of robbery. If the indictment is filed in the Third Circuit, the jury will be instructed only the offense of robbery. Defendants in the Third Circuit may thus

[1] Both parties have consented to NACDL's appearance in this matter as *amicus curiae*. No counsel for any party has authored this brief in whole or in part and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

have convicted of, if properly instructed, would be far less severe.

Because of the Third Circuit's anomalous ruling, making the geographical venue of the indictment the determinative factor in deciding what jury charge a defendant is entitled to receive, defendants in the Third Circuit are being singled out for excessive punitive treatment under a federal criminal statute that is supposed to be interpreted uniformly. The accused's constitutional rights to due process (including the right to the uniform application of the laws) and to a fair and impartial jury trial are plainly violated by the Third Circuit's decision. Beyond the effect of the decision on the Fifth and Sixth Amendment rights of the accused, however, the Third Circuit has ignored the continued vitality of fundamental rules of statutory construction established by this Court. In particular, this Court has repeatedly emphasized the importance of common law history to the interpretation of federal statutes predicated on common law crimes.

ARGUMENT

The United States Court of Appeals for the Third Circuit has ignored fundamental rules of statutory interpretation pronounced by this Court in disregarding the importance of common law history on the meaning of the crimes of bank robbery and bank larceny.

This Court has a lengthy tradition of recognizing that "a statutory term is generally presumed to have its common-law meaning." Taylor v. United States, 495 U.S. 575, 592 (1990). In enacting criminal statutes, Congress regularly legislates with a mind towards the historical and plain meaning of such offenses as embodied in Anglo-Saxon common law. United States v. Bailey, 444 U.S. 394, 415, n.11 (1980).

In recognizing the above guiding principles of statutory construction and interpretation, because common law background will routinely accompany any evaluation, Congress must express a specific and clear intent when deviating from a recognized common-law meaning. As announced in Nationwide Insurance Co. v. Darden, 503 U.S. 318, 322 (1992), (quoting Community for Creative Non-violence v. Reid, 490 U.S. 730, 739 (1989):

> We do, of course, presume that Congress incorporates the common-law meaning of the terms it uses if those "terms ... have accumulated settled meaning under ... the common law" and "the statute does not otherwise dictate."

See also United States v. Wells, No. 95-1228, 1997 U.S. LEXIS 1452, p. 18-19 (1997); United States v. Behrman, 258 U.S. 280 (1922); United States v. Balint, 258 U.S. 250, 251-252 (1922). In accordance with this rule of construction, the

Court directed in United States v. Turley, 352 U.S. 407, 411 (1957), "[W]here a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning."

In evaluating the Third Circuit's differentiation between the crimes of bank robbery and bank larceny in the instant matter, it is glaringly apparent that the Court of Appeals neglected to apply the above rule of statutory construction regarding common-law deference when conducting its interpretation. In ruling that the bank robbery offense provided in 18 U.S.C. §2113(a) does not implicitly include the element of an "intent to steal," the Third Circuit has effectively rejected the historical and common-law meanings of both robbery and larceny. United States v. Mosley, 126 F.3d 200, 204 (3d Cir. 1997).

Historically, larceny and related theft crimes are among the oldest crimes recognized and charged.[2] "Stealing,

[2] Remarkably, theft crimes were amongst the first offenses recognized and punished throughout history. "Thou shalt not steal." Bible, Authorized Version, Exodus, 20:15. There shall "be no robbry." John Heywood, Proverbs, pt. I, ch.IV (1546). The crimes of stealing and larceny are invasions of rights of property, which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is

larceny and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation." 2 Russell on Crime 1037 (10th ed., Turner, 1950). And traditionally, robbery was always considered an aggravated form of larceny at common law.[3]

In the seminal case, Morissette v. United States, 342 U.S. 246 (1952), defendant's theft conviction under 18 U.S.C. § 641 was reversed by this Court. The Court of Appeals had held that the failure of Congress to include an element of criminal intent in adopting the statute was evidence that Congress intended to make theft under the statute a strict liability crime. Id. at 250. Acknowledging that state courts of last resort have consistently retained the well-grounded, common-law requirement of intent in larceny-type offenses, this Court aptly noted:

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that of a felony. 2 Pollock and Maitland 465, History of English Law (2d ed. 1899).

[3] Larceny and robbery "are intimately connected, the one being included in the other" but robbery is "an aggravated larceny" and "the felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear." 2 East's Pleas of the Crown, ch. 16, §§1, 124 (1803 ed.). Robbery is a kind of "mixt or complicated larceny, ... a felonious and violent taking away from the Person of another, Goods or Money to any Value, putting him in Fear." 1 Hawkin's Pleas of the Crown, ch. 34, §§1,3 (1716 ed.). Robbery is "an aggravated species of larceny." 2 Russell on Crimes, 101 (4th ed. 1865).

> Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act.

Id. at 262.

Consequently, this Court held:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them.

Id. at 263.

Accordingly, the Morisette Court reversed the Court of Appeals' decision and attributed an intent element to the crime of larceny after a painstakingly thorough evaluation of

of the offense's common law history.[4] And, the intent element that was enunciated was defined as follows:

> ... [T]he removal of [the property] was a conscious and intentional act .... But that isolated fact is not an adequate basis on which the jury should find **the criminal intent to steal or knowingly covert, that is, wrongfully to deprive another person of property**. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances.

Id. at 276. (Emphasis supplied).

In summary, the intent necessary for any crime of larceny is "wrongfully to deprive another person of property." When evaluating the statute in question for the crime of bank robbery, it reads, " Whoever, by force or intimidation, takes, or attempts to take, from the person or presence of another, ... any property or money or any other thing of value belonging to ... any bank ...." 18 U.S.C. §2113(a). Therefore, the intent element, for robbery of a bank. is necessarily the same as the intent for larceny, and the

[4] "That felonious taking away of property which may be the subject of the offense constitutes the common law offense of larceny cannot be disputed ...." Morrissette, supra, 342 U.S. at

characteristic is the use of "force or intimidation." Thus, the only element that distinguishes bank robbery from bank larceny is the added element and existence of force and intimidation necessary for bank robbery, if due deference is given to the common-law meaning of the crimes.

Moreover, in contravention of criminal defendants' constitutional rights to due process, to a fair and impartial jury and to even application of the law, defendants indicted in the United States Court of Appeals for the Third Circuit are being singled out for excessive punitive treatment under a federal criminal statute that must be interpreted uniformly.[5]

Almost every federal circuit that has considered the issue has held that the crime of bank larceny prohibited by 18 U.S.C. Sec. 2113(b) is a lesser included offense of the crime of bank robbery prohibited by 18 U.S.C. Sec. 2113(a), and has therefore held that a criminal defendant charged with

U.S. at 266, n.28 (quoting Crabb v. Zerbst, 99 F.2d 562, 564-565 (5th Cir.1938)).

[5] There is a federal interest in uniformity and a constitutional due process interest in having firmly defined and easily applied rules. Indeed, in enacting the Federal Rules Congress' central goal was uniformity in the federal courts. See Hanna v. Plummer, 380 U.S. 460, 472 (1965); Chambers v. Nasco, Inc., 501 U.S. 32 (1991); Griffith v. Kentucky, 479 U.S. 314 (1987) (principles of equality require that similarly situated litigants should be treated the same).

of bank robbery prohibited by 18 U.S.C. Sec. 2113(a), and has therefore held that a criminal defendant charged with robbery is entitled to a jury instruction on the lesser included offense of larceny.

The Fourth Circuit in United States v. Carter, 540 F.2d. 753 (4th Cir. 1976), reversed the defendant's conviction holding that since bank larceny is a lesser included offense of bank robbery, it was constitutional error for the district court to fail to instruct the jury on the lesser included offense. This is because, as the Fourth Circuit noted, "Larceny, in fact, is generally regarded as a necessarily included offense in the crime of robbery . . . It is impossible to commit robbery without having first committed larceny". Id. at 754 (citing 8A Moore's Federal Practice para. 31.03[2]; 2 Wright Federal Practice and Procedure Sec. 515). See also United States v. Amos, 566 F.2d 899 (4th Cir. 1977) (holding that a conviction for bank larceny merges into a conviction for the greater offense of bank robbery).

The First Circuit in United States v. Henson, 945 F.2d 430, 440 (1st Cir. 1991) concluded that the principal difference between bank robbery under 18 U.S.C. Sec. 2113(a), and bank larceny, under 18 U.S.C. Sec. 2113(b), is that bank larceny does not include the elements of "force and violence or . . . intimidation". Id. at 440. Consequently, a criminal defendant is entitled to an instruction on the lesser

permit a rational jury to find guilt under the lesser charge and to acquit on the charge alleged. Id.

The Sixth Circuit in United States v. Perry, 991 F.2d 304, 307 (6th Cir. 1993), rejected defendant's argument that he was entitled to a jury instruction on the lesser included offense of bank larceny solely because such charge was not supported by the evidence in the record. Although the court did not reach the issue raised by defendant, that bank larceny is a lesser included offense of bank robbery, the court noted, "there is no evidence in the record to support a finding that *the lesser included offense of bank larceny*, which lacks the element of force and violence or intimidation, was committed *while the greater offense of bank robbery* was not," thereby giving some insight on how the court would rule should the issue at some point be presented. Id. at 311 (emphasis supplied).

The Eighth Circuit in United States v. Cady, 495 F.2d 742, 748 (8th Cir. 1974), similarly held that the only difference between bank larceny and bank robbery is that the taking in bank robbery must be by force violence or intimidation. See also United States v. Flint, 534 F.2d 58, 60 (5th Cir. 1976) (noting that the crime of bank robbery requires "the additional element [of] taking "by force or violence, or by intimidation").

In United States v. Sandles, 80 F.3d 1145 (7th Cir. 1996), the court found that as an element of the crime of bank robbery, the government must prove that the accused committed the crime by force and violence, or by intimidation. This element is missing from the lesser included crime of bank larceny under 18 U.S.C. Sec. 2113(b). Id. at 1147, n.1. See also United States v. Cornillie, 92 F.3d. 1108, 1109 (11th Cir. 1996) (bank larceny only lacks the essential element of force or intimidation to be a robbery); United States v. Brittain, 41 F.3d 1409 (10th Cir. 1994) (holding that larceny is a lesser included offense of bank robbery).

Finally, in Walker v. United States, 418 F.2d 1116 (D.C. Cir. 1969) the District Court for the District of Columbia declared that "it is beyond dispute that larceny is a necessarily included offense of the crime of robbery" under the District of Columbia Criminal Code. Id. at 1120.

Indeed, only the Ninth Circuit has concluded that larceny is not a lesser included offense of robbery. See United States v. Gregory, 891 F.2d 732 (9th Cir. 1989) (holding that larceny contains a specific intent element not required for a bank robbery conviction).

It is respectfully submitted that the Ninth Circuit in Gregory and the Third Circuit below erred in applying the principles enunciated by this court in Schmuck v. United

States, 489 U.S. 705 (1989). There, this Court established the "elements test" to determine whether one offense is necessarily included in another, thereby entitling a criminal defendant to have the jury instructed on a lesser included offense of the crime charged pursuant to Federal Rule of Criminal Procedure 31(c). Under the elements test, a lesser offense cannot contain an element not required for the greater offense. The elements of the lesser crime must form a subset of those of the charged offense in order for the lesser offense to be included in the greater one. The comparison "is appropriately conducted by reference to the statutory elements of the offenses in question." Id. at 718. The comparison must be textual. Id. at 720.

In holding that the crime of bank larceny is not a lesser included offense of the crime of bank robbery, the Third Circuit below concluded that the definition of bank robbery in subsection (a) does not include an element that the defendant have the "intent" to steal, while this element of intent is required for a conviction under subsection (b). In engaging in this analysis, the Third Circuit framed the issue as whether the "steal or purloin" provision is included impliedly as an element of bank robbery in subsection (a). The Third Circuit's conclusion that the bank robbery statute does not include an intent element and that the subjective intent of a bank robber to steal is irrelevant, entirely ignores

this Court's jurisprudence regarding the presumptive implied intent element in federal criminal statutes.

The Third Circuit's decision has in effect made bank robbery under subsection (a) a strict liability crime. Strict liability for criminal offenses, however, runs afoul of a criminal defendant's constitutional due process rights and this Court's long history of interpreting criminal statutes to include applicable scienter requirements, even where the statute by its terms does not contain them. United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994); Staples v. United States, 511 U.S. 600 (1994) (emphasizing that the requirement of *mens rea* for a crime is firmly embedded in the common law).

Indeed, as this Court related in Morissette, general principles of liability require that a criminal defendant must have the requisite mens rea before he can be convicted of a crime:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as unequivocal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

342 U.S. at 250.

Supra, 342 U.S. at 250.

Indeed, this is consistent with the Model Penal Code policy that "knowing" behavior is required by offenses which are defined without a specified mental state element. Cf. Morissette, 342 U.S. at 252 ("As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation.")

Moreover, it is difficult to ascertain how an intent requirement is not implied in bank robbery which requires taking money or any other thing of value by force and violence or intimidation from the person or presence of another. 18 U.S.C Sec. 2113(a). Therefore, as most of the circuits which have considered the issue have concluded: robbery is in effect larceny with the additional element of force or intimidation.

Conclusion

For all the foregoing reasons, the Third Circuit's ruling must be reversed.

Respectfully submitted,

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